16-350

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~341.~~ 71

JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, EUGENE G. ST. CLAIR, AND GEORGE A. ST. CLAIR, PLAINTIFFS IN ERROR,

vs.

WILLIAM M. COX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 15, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 341.

JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, EUGENE G. ST. CLAIR, AND GEORGE A. ST. CLAIR, PLAINTIFFS IN ERROR,

vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court for the sixth circuit and eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court before you, between William M. Cox and Julius N. St. Clair, James O. St. Clair, Eugene G. St. Clair, and George A. St. Clair, a manifest error has happened to the great damage of the said Julius N. St. Clair, James O. St. Clair, Eugene G. St. Clair and George A. St. Clair, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this writ, so that you may have the same at Washington, on the second Monday of October
2 next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court this sixteenth day of December, in the year of our Lord one thousand eight hundred & seventy-eight.

ADDISON MANDELL,
Clerk.

Allowed by—

HENRY B. BROWN,
U. S. District Judge, for the Eastern District of Michigan.

(Indorsed:) 6229. United States of America. Julius N. St. Clair, et al., plaintiffs in error, vs. Wm. M. Cox, def't in error. Writ of error. Filed Dec. 16, 1878. A. Mandell, cl'rk. Dan. H. Ball, att'y for pl'ff in error.

3 UNITED STATES OF AMERICA, *ss:*

To WILLIAM M. COX, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court for the sixth circuit and eastern district of Michigan, wherein Julius N. St. Clair, James O. St. Clair, Eugene G. St. Clair and George A. St. Clair are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry B. Brown, one of the judges of the said circuit court for the eastern district of Michigan, this sixteenth day of December, in the year of our Lord one thousand eight hundred & seventy-eight.

HENRY B. BROWN,
U. S. District Judge for the Eastern District of Michigan.

4 STATE OF MICHIGAN,
County of Wayne, ss:

On this sixteenth day of December, A. D. 1878, personally appeared before me at Detroit, in said county, the subscriber Joseph C. Gibson, & made oath that he served a true copy of the within citation upon Messrs. Griffin & Dickinson, the attorneys for the plaintiff below, and defendant in error at Detroit, on the 16th day of December, A. D. 1878, by delivering the same on George S. Hosmer, a clerk in their office.

JOSEPH C. GIBSON.

Subscribed & sworn to before me this 16th day of December, A. D. 1878.

HENRY A. HARMON,
Notary Public, Wayne County, Mich.

(Indorsed:) 6229. U. S. of America. Julius N. St. Clair et al., pl'ff' in error, vs. Wm. M. Cox, def't in error. Citation to def't to appear. Filed Dec. 16, '78. A. Mandell, cl'k. Dan. H. Ball, att'y for pl'ff in error.

5 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan at the district court-room, in the city of Detroit, of the term of June, in the year of our Lord one thousand eight hundred and seventy-nine.

IN THE CASE WHEREIN WILLIAM M. COX IS plaintiff
and
JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene St. Clair, and George A. St. Clair are defendants. } 2629.

Be it remembered that on twenty-first day of January, in the year of our Lord one thousand eight hundred and seventy-eight, the said plaintiff, by Griffin & Dickinson, his attorneys, came into the court aforesaid, before the judges thereof, and filed his declaration against the said defendants, which said declaration is in the words and figures following, to wit:

6, 7 *Declaration.*

UNITED STATES OF AMERICA.

The circuit court of the United States for the eastern district of Michigan, of the term, A. D. 187 .

EASTERN DISTRICT OF MICHIGAN, *ss:*

William M. Cox, who is a resident of Chicago, in the State of Illinois, and who is a citizen of the State of Illinois, by Griffin & Dickinson, attorneys, filing this his declaration as commencement of suit, complains of Julius N. St. Clair, James O. St. Clair, Eugene St. Clair, and George A. St. Clair, who are copartners in business, under firm name of St. Clair Brothers, who are residents of Ishpeming, in the eastern district of Michigan, and who are citizens of the State of Michigan, of a plea of trespass on the case upon promises.

And that whereas the said defendants on the 18th day of January,

A. D. 1878, at Detroit, in said district, were indebted to the plaintiff in the sum of ten thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request.

And in a like sum for the price and value of work then and there done and materials for the same, provided by the plaintiff for the defendants at their request.

And in a like sum for money then and there lent by the plaintiff to the defendants, at their request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendants, at their request.

And in a like sum for money then and there received by the defendants for the use of the plaintiff.

8 And in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants afterwards, and on the day and year and at the place aforesaid, in consideration of the premises respectively, then and there promised the said plaintiff to pay him the said several last-mentioned moneys, respectively, on request. Yet said defendants have disregarded their said promises, and have not paid any of the said moneys, or any part thereof, although often requested so to do, to the plaintiff's damage of ten thousand dollars; and therefore he brings suits, etc.

GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

Notice endorsed.

To the above-named defendants:

Take notice that on the trial of the above cause the plaintiff under the money counts will give in evidence two certain promissory notes, copy of which is given below, and which constitutes the sole bill of particulars of plaintiff's demand in the above-entitled cause.

GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

(Copy.)

$2,500.] ISHPEMING, MICH., *Aug. 2d*, 1877.

Five months after date we promise to pay to the order of Winthrop Mining Co. twenty-five hundred dollars, at German Nat'l Bank, Chicago, with int. at 7 % per annum, value received.

ST. CLAIR BROS.

(Written across the face:) Protested for non-payment. Jan'y 5, 1878.

J. B. MEYER.

9 (Indorsed:) "WINTHROP MINING CO.,
By S. E. ONERMAN, *Treas.*"

$2,500.] ISHPEMING, MICH., *Aug. 2d*, 1877.

Five days after date we promise to pay to the order of Winthrop Mining Co. twenty-five hundred dollars at German Nat'l B'k, Chicago, with int. at 7 % per annum, value received.

ST. CLAIR BROS.

(Written across the face:) Protested for non-payment Jan'y 5, 1878.
J. B. MEYER.

(Endorsed:) "WINTHROP MINING CO.,
By S. E. ONERMAN, *Treas.*"

We hereby acknowledge ourselves sureties for the payment by the plaintiff of all costs for which he may become liable in the within action.

January 21st, 1878.

GRIFFIN & DICKINSON.

(Endorsed:) Filed Jan. 21, 1878. A. Mandell, clerk.

10 Upon the filing of which said declaration the following rule was entered:

Rule to plead.—Jan'y 21, 1878.

WILLIAM M. COX
vs.
JULIUS N. ST. CLAIR, JAMES O. ST. Clair, Eugene St. Clair, & George A. St. Clair.

On filing declaration in this cause as commencement of suit, and on motion of Griffin and Dickinson, attorneys for the plaintiff, it is ordered that the said defendants appear and plead to said declaration within twenty days after service upon them of a copy thereof and notice of this rule or judgment, &c.

GRIFFIN & DICKINSON,
Att'ys for Pl'ff.

Afterwards, to wit, on the 28 day of January, 1878, said plaintiff caused to be filed in said court proof of service of said declaration, in the words and figures following, to wit:

11 *Proof of service of declaration, &c.*

EASTERN DISTRICT OF MICHIGAN,
County of Marquette, ss:

George M. Hayden, being duly sworn, deposes and says that he is a resident of the city of Ishpeming, in said county of Marquette, Michigan; that on the 25th day of January, A. D. 1878, at said city of Ishpeming, he served the declaration, of which the annexed is a copy, on George A. St. Clair, Eugene St. Clair, and Julius N. St. Clair, three of the defendants named in said declaration, by delivering to each of said three defendants, at said city of Ishpeming, a true copy thereof, and of the promissory notes contained therein, two in number, and of the notice relating thereto, together with a true copy of the notice to appear and plead, endorsed upon each of said declarations so served, as endorsed upon the annexed; and he further says that the same could not be served upon the other defendant James O. St. Clair, for the reason that he is not in this State, and that deponent is informed by the three defendants above named, served as aforesaid, that said James O. St. Clair is now in Marseilles, in the Republic of France.

(S'g'd) GEO. W. HAYDEN.

Subscribed & sworn to before me this 25th day of January, A. D. 1878.

CARL S. WENDEL,
Notary Public, Marquette Co., Mich.

12 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

The circuit court of the United States for the eastern district of Michigan, of the term, A. D. 187 .

William M. Cox, who is a resident of Chicago, in the State of Illinois, and who is a citizen of the State of Illinois, by Griffin & Dickinson, attorneys, filing this his declaration as commencement of suit complains of Julius N. St. Clair, James O. St. Clair, Eugene St. Clair, and George A. St. Clair, who are copartners in business under firm name of St. Clair Brothers, who are residents of Ishpeming, in the eastern district of Michigan, and who are citizens of the State of Michigan, of a plea of trespass on the case upon promises.

And that whereas the said defendants, on the 18th day of January, A. D. 1878, at Detroit, in said district, were indebted to the plaintiff in the sum of ten thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiff to the defendants, at their request.

And in a like sum for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendants at their request.

And in a like sum for money then and there lent by the plaintiff to the defendants, at their request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendants, at their request.

13 And in a like sum for money then and there received by the defendants for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants, afterwards, and on the day and year and at the place aforesaid, in consideration of the premises respectively, then and there promised the said plaintiff to pay him the said several last-mentioned moneys, respectively, on request.

Yet said defendants have disregarded their said promises, and have not paid any of the said moneys, or any part thereof, although often requested to do so, to the plaintiff's damage of ten thousand dollars; and therefore he brings suit, etc.

(S'g'd) GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

To the above-named defendants:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence two certain promissory notes, copy of which is given below, and which constitutes the sole bill of particulars of plaintiff's demand in the above-entitled cause.

GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

(Copy.)

$2,500.] ISHPEMING, MICH., *Aug. 2d*, 1877.

Five months after date we promise to pay to the order of Win-
14 throp Mining Co. twenty-five hundred dollars, at German Nat'l Bank, Chicago, with int. a' 7 % per annum, value received.

ST. CLAIR BROS.

(Written across the face:) Protested for non-payment. Jan'y 5, 1878.

J. B. MEYER.

(Endorsed:) WINTHROP MINING CO.,
By S. E. ONERMAN, *Treas.*

$2,500.] ISHPEMING, MICH., *Aug. 2d*, 1877.

Five months after date we promise to pay to the order of Winthrop Mining Co. twenty-five hundred dollars, at German Nat'l B'k, Chicago, with int. at 7 % per annum.

ST. CLAIR BROS.

(Written across the face:) Protested for non-payment. Jan'y 5, 1878.

J. B. MEYER.

(Endorsed:) WINTHROP MINING CO.,
By S. E. ONERMAN, *Treas.*

(Endorsed:) Filed Jan'y 28, 1878. A. Mandell, clerk.

Afterwards, to wit, on the 13th day of February, A. D. 1878, came the said defendants, by Daniel H. Ball, their attorney, and file' their plea to said declaration in the words following, to wit:

15 UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michigan.

WILLIAM M. COX
vs.
JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene G. St. Clair, George A. St. Clair.

Now comes the said defendants Julius N. St. Clair, Eugene G. St. Clair, and George A. St. Clair, by Dan. H. Ball, their attorney, and say that they did not undertake and promise in manner and form as the said plaintiff has in his declaration alleged against them.

(S'g'd) DAN. H. BALL,
Marquette, Michigan, Attorney for said Def'ts.

16 And thereupon afterwards, to wit, on the 18' day of February, A. D. 1878, came the said defendants and filed an affidavit of merits in said cause in the words and figures following, to wit:

17 *Affidavit of merits.*

UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michigan.

JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene G. St. Clair, George A. St. Clair
ads.
WILLIAM M. COX.

COUNTY OF MARQUETTE, *ss:*

George A. St. Clair, one of the defendants in the above-entitled

cause, being duly sworn, deposes and says that he has fully and fairly stated the case in this cause to Dan. H. Ball, esq., his counsel in said cause, who resides in the city of Marquette, in said county, and that the above-named defendants have a good and substantial defense upon the merits thereof, as he is advised by his said counsel, after such statement made as aforesaid and verily believes to be true.

(S'g'd) GEORGE A. ST. CLAIR.

Subscribed & sworn to before me this 14th day of February, A. D. 1878.

(S'g'd) WILLIAM H. REED,
Notary Public in and for said County of Marquette.

18 Afterwards, to wit, on the 18' day of February, A. D. 1878, come said defendants, by their said attorney, and filed in said court an amended plea and notice, in the words and figures following, to wit:

19 *Amended plea.*

UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michigan.

WILLIAM M. COX *vs.* JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene G. St. Clair, George A. St. Clair.	Amended plea & notice.

Now comes the said defendants, Julius N. St. Clair, Eugene G. St. Clair, and George A. St. Clair, by Dan. H. Ball, their attorney, and say that they did not undertake and promise, in manner and form, as the said plaintiff in his declaration has alleged against them.

DAN H. BALL,
Marquette, Mich., Att'y for said Def'ts.

GENTLEMEN: Please to take notice that upon the trial of this cause the said defendants will insist and prove under the general issue above pleaded:

1st. That the promissory notes, copies of which are annexed to the plaintiff's declaration, if any such were made by the said defendants, were given without consideration and were void.

2d. That said notes, if executed by the said defendants, were, together with two other notes, each of like tenor and amounts, amounting in all to the sum of ten thousand dollars, executed and delivered to the Winthrop Mining Compapny, payee therein named, as part payment for a quantity of iron ore and goods and chattels then sit-
20 uated at the mine known as the Winthrop mine, in the county of Marquette, until then occupied by said Winthrop Mining Company, which goods and chattels and iron ore were then bargained and sold by said Winthrop Mining Company to the said defendants.

That upon said purchase, which was made at the office of said Winthrop Mining Company, in the city of Chicago, in the State of Illinois, the said Winthrop Mining Company then, by its officers and agents violating said sale, represented to said defendants that there were eight

thousand tons of said ore at said mine, and that there were goods and chattels there situate, of which a pretended inventory was then by said Winthrop Mining Company exhibited to said defendants, and which were included in said sale, amounting in value, as per said invoice, to the sum of eighteen thousand seven hundred and thirty-three dollars or thereabouts; that upon the faith of said representations, and relying thereon, the defendants executed and delivered said notes.

That in fact there were not then at said mine, nor were there delivered to said defendants under said sale, eight thousand tons of iron ore but a much less amount, to wit, not more than four thousand tons of said ore; nor were all said goods and chattels mentioned in said inventory, and for which said notes were given, to be found at said mine, or ever delivered by said Winthrop Mining Company, or by any one in its behalf to said defendants; nor was said Winthrop Mining Company the owner of all of the said goods and chattels specified in said inventory; but that many of said goods and chattels were entirely missing and not to be found, nor were they delivered to defendants, amounting to a large
21 sum of money at the said inventory-price thereof, to wit, to the sum of eight thousand dollars, and of the value of eight thousand dollars; and that the shortage on said iron ore amounted to the sum of six thousand dollars, by reason whereof the consideration of said notes wholly failed.

3d. That at the time of the execution and delivery of the said notes, copies of which are annexed to the plaintiff's declaration, the said Winthrop Mining Company, the payee therein named, in consideration thereof, and of two other notes, each of like tenor and amount, and other large sums of money paid by the defendants, bargained and sold, and promised and agreed to sell and deliver to said defendants, at the Winthrop mine, in the county of Marquette, eight thousand tons of iron ore in stock pile from said Winthrop mine, and certain goods and chattels, of which an inventory was then and there furnished, amounting, at the prices therein fixed, to the sum of eighteen thousand seven hundred and thirty-three dollars, and which were worth said sum of money.

But that said Winthrop Mining Company did not nor would deliver unto said defendants but a small portion of such iron ore, to wit, four thousand tons, and a small part of said goods and chattels, to wit, ten thousand dollars' worth of said goods and chattels, according to said inventory price; and that said company wholly omitted and refused to produce and deliver to said defendants a large part of said goods and chattels, to wit, goods and chattels amounting to eight thousand dollars and upwards, according to the inventory price thereof and according to their actual value.

22 Whereby said defendants were injured and suffered damage to the amount of twelve thousand dollars, which they will recoup from the said amount claimed in said declaration.

4th. That at and before any transfer of said promissory notes by the said Winthrop Mining Company (if the same have been by it transferred) and at the time of the commencement of this suit the said Winthrop Mining Company was and still is indebted to the said defendants in a large sum of money, to wit, the sum of ten thousand dollars, upon a judgment before then rendered against it by the circuit court for the county of Marquette, in the State of Michigan, in favor of the said defendants, in a suit prosecuted in said court by said defendants against said Winthrop Mining Company, of which cause said court had jurisdiction.

5th. That the plaintiff in this suit is not a bona-fide owner and holder of said notes; that he has not purchased them for value; that if the same were ever transferred to the plaintiff or to any one by the Winthrop Mining Company, it was after the maturity and dishonor thereof, and that at the time of such transfer the transferee and said plaintiff had full notice and knowledge of the several defences hereinbefore set forth, and that the plaintiff and all persons in whose behalf this suit is brought by him are charg'able with notice of the several defences above set forth.

Feb'y 22d, 1878.

Yours, &c.,

DAN. H. BALL,
Marquette, Mich., Att'y for said Def'ts.

To Messrs. GRIFFIN & DICKINSON,
Detroit, Mich., Att'ys for Pl'ff.

(Endorsed:) Filed Feb'y 18, 1879. A. Mandell, clerk.

23 *Venire—1st trial.—Verdict.*

Therefore to try the issue above joined let a jury come thereof, by whom, &c., who within, &c., because as well the said plaintiff as the said defendants have put themselves on that jury.

And the jurors of that jury of whom mention is made, to wit, James Dubois, Isaac P. Moseley, Cortez Fessenden, Peter Huyser, John Moran, Dexter Mussey, Nathan N. Kendall, Herman Wychoff, Thomas J. Godfrey, Frederick Morley, Henry W. Toynton, and Michael H. Hughes, who were on the fifth day of April, A. D. 1878, elected, tried, and sworn well and truly to try the issue joined in said cause, and after hearing the evidence adduced and the arguments of counsel, and after receiving the charge of the court said jury say find that said defendants did undertake and promise in manner and form as said plaintiff has in his declaration alleged, and on occasion thereof assess the plaintiff's damages against the said defendants at the sum of five thousand two hundred and forty-one dollars and eighty-four cents ($5,241.84.)

Thereupon, on motion of counsel for defendants, the following order was entered in said cause on said April 5, 1878, to wit:

On motion of Mr. Crofoot, of counsel for defendants, it is ordered that defendants have ten days in which to move for a new trial in this cause, and that in the mean time all proceedings in said cause be stayed.

24 Afterwards, to wit, on the 6 day of April, A. D. 1879, came said defendants by Messrs. Ball and Owen, their attorneys, and filed a motion for a new trial of said cause in the words and figures following, to wit:

Motion for new trial.

WILLIAM M. COX
vs.
JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene St. Clair, and George A. St. Clair.

The defendants by Ball and Owen, attorneys, now come and move

the court to set aside the verdict and grant a new trial in said cause for the following reasons:

First. Because the court held and declared as a matter of law that under the proofs submitted on said trial that the plaintiff was a bona fide holder of the notes in suit, and therefore said defendants were not entitled to make the defense to said notes which they could have made in the hands of the payee.

Second. Because the court held and ruled as matter of law that the defendants were not entitled to make their defense that said notes were obtained by the payee by fraud and without consideration.

Third. Because the court held as matter of law that the defendants could not set off a judgment which they had obtained against the payee of said notes.

25 Fourth. Because the court held and ruled that the defendants could not make a defense in said cause, as the proofs in the case showed that the plaintiff was a bona fide holder of the notes in suit, and became such before their maturity, and the defense proposed could not be made against said notes in said plaintiff's hands.

Dated 5 April, 1878.

(Sig'd) BALL AND OWEN,
Att'ys for Def'ts.

M. E. CROFOOT,
Of Counsel.

Afterwards, to wit, on the 26th day of April, A. D. 1878, an order was entered in said cause in the words following, to wit:

WILLIAM M. COX
vs.
GEORGE A. ST. CLAIR, JAMES O. ST. CLAIR, Eugene St. Clair, and Julius N. St. Clair. } 6229.

The motion for a new trial in this cause and to set aside the verdict therein, now coming on to be heard, is argued and submitted, and said verdict is hereby vacated and set aside and this cause is hereby set for trial on the second day of the next ensuing June term of this court.

26 *2d trial.—Venire.—Verdict.*

Thereupon to try the issue above joined let a new jury come thereof, by whom, &c., to recognize, &c., because as well the said plaintiff as the said defendants have put themselves upon that jury.

And the jurors of that jury of whom mention is made, to wit: A. B. Clark, J. L. Marks, George Reed, Warren Gias, John J. Robinson, Henry T. Cole, R. D. Carns, L. D. F. Armstrong, Moses C. Hunt, John L. Frisbie, Andrew J. Cummings, and Charles Kendall, who were, on the 6th day of June, A. D., 1878, duly elected, tried, and sworn well and truly to try the issue joined in this cause, and after hearing the arguments of counsel and receiving the charge of the court, said jury retire to their room to consult of their verdict, in charge of the officer sworn to attend them, and after a short absence said jury return into court and say they find that said defendants did undertake and promise in manner and form as said plaintiff has complained against them, and on occasion thereof assess the plaintiff's damages against the said defendants at the sum of five thousand two hundred and ninety-nine dollars and twenty-two cents ($5,299.22).

And thereupon, on motion of counsel for defendants, ten days' time is granted to said defendants to settle bill of exceptions.

Afterwards, to wit, on the 10th day of June, A. D. 1878, judgment was rendered upon the verdict last above entered in said cause in the words and figures following, to wit:

27 WILLIAM M. COX
vs.
JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene St. Clair, and George A. St. Clair.

The jurors empaneled and sworn to try the issue joined between the parties in this cause, having heretofore, to wit, on the sixth day of June, A. D. 1878, assessed the plaintiff" damages against the said defendants at the sum of five thousand two hundred and ninety-nine dollars and twenty-two cents, it is therefore, on motion of plaintiff's attorney, considered by the court now here, that the said plaintiff do recover of and against the said defendants the said sum of five thousand two hundred and ninety-nine dollars and twenty-two cents ($5,299.22), damages assessed as aforesaid, together with said plaintiff's costs of this suit to be taxed, &c.

Thereupon, upon motion of Mr. Montrose, of counsel for defendants, it was ordered by the court that all proceedings in said cause be stayed ten days, with leave to defendants to file bond, with usual time to file bill of exceptions.

28, 29 *Bill of exceptions.*

In the circuit court of the United States for the eastern district of Michigan.

WILLIAM M. COX
vs.
JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, Eugene G. St. Clair, and George A. St. Clair.

At a session of said court held in the city of Detroit, in said district, on the fifth & sixth days of June, A. D. 1878, before the honorable Henry B. Brown, judge of said court, the issue joined between the parties in this cause came on to be tried by jury.

Thereupon the counsel for the plaintiff, to maintain said issue on his part, offered and read in evidence the note on which suit was brought and the endorsement thereon, and then rested his case.

Counsel for defendant, to maintain issue on his part, gave evidence tending to show that plaintiff was not a bona fide holder for value of said notes.

Counsel for defendant then offered in evidence an exemplification of the proceedings in a suit commenced by attachment in the circuit
30 court for the county of Marquette, State of Michigan, on the 23rd day of August, A. D. 1877, in which suit said Eugene G. St. Clair, James O. St. Clair, Julius N. St. Clair, and George A. St. Clair were plaintiffs, and the Winthrop Mining Company was defendant, in which suit said plaintiffs recovered judgment for $6,450 and costs, taxed at $31.00, against said Winthrop Mining Company.

Counsel for plaintiff objected to the introduction of said exemplification

36 *Bond.—(Copy.)*

Supreme Court of the United States.

WILLIAM M. COX
vs.
GEORGE A. ST. CLAIR, EUGENE G. ST. CLAIR, Julius N. St. Clair, & James O. St. Clair.

Know all men by these presents that we, George A. St. Clair, Eugene G. St. Clair, Julius N. St. Clair, and James O. St. Clair, of the city of Ishpeming, in the State of Michigan, as principals, and Edward Breitung and Samuel Mitchell, of Marquette County, in the same State, as sureties, are held and firmly bound unto William M. Cox, of the city of Chicago, in the State of Illinois, the plaintiff above named, in the sum of ten thousand six hundred dollars, to be paid to the said William M. Cox, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated this 21st day of June, A. D. 1878.

Whereas the above bounden George A. St. Clair, Eugene G. St. Clair, Julius N. St. Clair, and James O. St. Clair, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if
37 the said George A. St. Clair, Eugene G. St. Clair, Julius N. St. Clair, and James O. St. Clair, shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Sig'd)	GEORGE A. ST. CLAIR.	[L. S.]
(")	EUGENE G. ST. CLAIR.	[L. S.]
(")	JULIAN N. ST. CLAIR.	[L. S.]
(")	JAMES O. ST. CLAIR.	[L. S.]
(")	EDWARD BREITUNG.	[L. S.]
(")	SAMUEL MITCHELL.	[L. S.]

Signed & sealed in presence of—
(Sig'd) GEORGE PELMEM, as to signature of Sam'l Mitchell.
(Sig'd) ROWLAND SAVAGE, as to signature of Edward Breitung.
(Sig'd) EDWARD BREITUNG, as to the signatures of the St. Clairs.

I certify that I am acquainted with Edward Breitung and Samuel Mitchell, sureties above named, and with their pecuniary condition and responsibility, and that I believe them to be sufficient sureties for the purposes of the above bond.

(Sig'd) MATHEW H. MAYNARD,
U. S. Comm'r E. Dist. Mich.

MARQUETTE, *June* 21, 1878.

Approved.
(Sig'd) H. B. BROWN,
U. S. District Judge for the Eastern District of Michigan.

(Endorsed:) Filed June 27, 1878. A. Mandell, cl'k.

38 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true transcript of the original record of the judgment of said court in the case therein of William M. Cox, plaintiff, against Julius N. St. Clair, James O. St. Clair, Eugene St. Clair, and George A. St. Clair, defendants; that I have carefully compared the same with the original thereof, and the same is a true and correct transcript of the whole thereof and also of the bond in error in said cause; and further that the bill of exceptions and assignment of errors annexed thereto are the originals thereof filed in said cause.

In testimony whereof I have hereunto subscribed my name officially and affixed the seal of said court this 12th day of September, A. D. 1879, at Detroit.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $14.30.

(Indorsement on cover:) No. 341. Julius N. St. Clair, James O. St. Clair, Eugene G. St. Clair, and George A. St. Clair, plaintiffs in error, vs. William M. Cox. E. Michigan C. C. U. S. Filed 15th October, 1879.

16-350

OFFICE SUPREME COURT U.S.
FILED
OCT 21 1882
JAMES H. MCKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

No. 71.

JULIUS N. ST. CLAIR,
JAMES O. ST. CLAIR,
EUGENE G. ST. CLAIR, AND
GEORGE A. ST. CLAIR,

Plaintiffs in Error,

vs.

WILLIAM M. COX,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

ASSIGNMENT OF ERRORS,

AND

BRIEF FOR PLAINTIFFS IN ERROR.

C. I. WALKER, *Attorney for Plaintiffs in Error.*
GRIFFIN & DICKINSON, *Attorneys for Defendant in Error.*

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

JULIUS N. ST. CLAIR,
JAMES O. ST. CLAIR,
EUGENE G. ST. CLAIR, AND
GEORGE A. ST. CLAIR,
Plaintiffs in Error,

vs.

WILLIAM M. COX,
Defendant in Error.

ASSIGNMENTS OF ERROR.

Afterwards, to-wit: on the 14th day of October, in this same term, before the Judges of the Supreme Court of the United States, came the said Julius N. St. Clair, James O. St. Clair, Eugene G. St. Clair and George A. St. Clair, by C. I. Walker, their attorney, and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, to-wit:

That the said Circuit Court of the United States, for the Eastern District of Michigan, on the trial of this cause, refused to admit in evidence on behalf of said plaintiffs in error, who

were defendants below, a certain exemplification of the proceedings in a suit commenced by attachment in the Circuit Court for the County of Marquette, State of Michigan, A. D. 1877, in which suit said Eugene G. St. Clair, James O. St. Clair, Julius N. St. Clair and George A. St. Clair were plaintiffs and The Winthrop Mining Company was defendant, in which suit said plaintiffs recovered judgment for $6450 and costs taxed at $31 against said Winthrop Mining Company ; which exemplification is described in the proceedings set forth on page 12 of the printed transcript of record in the case ; and the offer of the same in evidence is found on page 11 of said transcript.

C. I. WALKER,
Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 71.

JULIUS N. ST. CLAIR, *et al.*,

Plaintiff in Error.

vs.

WILLIAM N. COX,

Defendant in Error.

BRIEF OF C. I. WALKER,

Attorney for Plaintiff in Error.

1st. The declaration in this case was filed on the 28th of January, 1878, in an action of assumpsit, upon the common counts, with a notice thereto annexed, that under the money counts the plaintiff below, the defendant in error would give in evidence two certain promissory notes executed by the defendants (the plaintiffs in error) under the firm name of St. Clair Brothers, payable to the Winthrop Mining Company. These notes were dated August 2nd, 1877, and were given for the sum of $2500 each, payable respectively in five months after date, with interest at seven per cent.

Record, pp. 5 and 6.

2nd. On the 18th of February following, the defendants below filed a plea of the general issue with a notice of defence.

Record, pp. 7 to 9.

3rd. The notice sets up several defences to the notes :

a. That the notes were given without consideration

b. That they were obtained by misrepresentation and fraud.

c. That the Winthrop Mining Company refused to perform the contract, in consideration of which said notes were given.

d. That before the transfer of said notes by the payee, said Winthrop Mining Company, and at the time of the commencement of this suit, said company was and still is indebted to said defendants below in a large sum of money, to-wit: the sum of $10,000 upon a judgment before then rendered against it by the Circuit Court of the County of Marquette in favor of said defendants below.

e. That the plaintiff below, (said Cox,) the defendant in error, is not a *bona fide* owner and holder of said notes, and that they were transferred to him by the said Winthrop Mining Company after the maturity and dishonor thereof, and that said plaintiff below had full notice and knowledge of the defences mentioned.

Record, pp. 7 to 9.

4th. Upon these issues the case was tried on the 5th of April, 1878, and a verdict given for the plaintiff below, and on the 26th of April a new trial was granted in said cause.

Record, pp. 9 to 10.

5th. On the 6th of June, 1878, the second trial came on, and it resulted in a verdict for the plaintiff below, for $5299.22, and the defendants below filed their bill of exceptions.

Record, pp. 10 and 11.

BILL OF EXCEPTIONS.

The bill shows the following facts :

1st. That the plaintiff below read in evidence the notes declared upon and rested.

2nd. That the defendants below gave evidence tending to show that the plaintiff below was not a *bona fide* holder of said notes for value.

Record, p. 11.

3rd Counsel for defendants below then offered in evidence an exemplification of the proceedings in a suit commenced by attachment in the Circuit Court for the County of Marquette, on the 23rd of August, 1877, in which the defendants below were plaintiffs and the Winthrop Mining Company defendant, and in which the defendants below recovered a judgment against the Mining Company of $6450.00 and costs.

4th. Counsel for plaintiff below objected to the introduction of said exemplification of record "on the ground that it had not been shown that the Circuit Court for the County of Marquette had obtained jurisdiction to (of) the parties to suit." And no other objection was made to the record.

No appearance was made by the defendant in said attachment suit, and judgment was taken by default.

Record, pp. 11 and 12.

The bill then sets out so much of said record as bears upon the question of jurisdiction of the parties.

In the affidavit for attachment the residence of the plaintiffs therein is not set out, and the only allusion to it is in the following recitation from the affidavit: "George A. St. Clair, of said county, being duly sworn deposes and says."

Record, p. 12.

The declaration in said attachment sets out that the Winthrop Mining Company is a corporation organized and existing under the laws of the State of Illinois.

Record, p 12.

The officer's return shows that certain property of the defendant in said attachment suit was attached, and that a copy of the attachment with the inventory was served upon said defendant by delivering the same to Henry J. Colwell, Esq., agent for the said Mining Company personally in said County of Marquette."

The Court sustained the objection, and the defendants below then and there excepted and rested their case.

Record, p. 12.

After the said exemplification of the record in the attachment suit had been excluded, the plaintiff below, in putting in his rebuttal, introduced as a witness, one Meeker, who testified that Colwell was not the agent of the Mining Company at the time that said service was made upon him on the 25th of August, 1877.

Record, p, 12 and 13, fol. 22.

QUESTION.

The sole question therefore raised upon the record is whether the Court below erred in excluding the exemplification offered in evidence, upon the single ground that the Court which rendered the judgment had no jurisdiction over the parties.

The Circuit Court for the County of Marquette is a court of general jurisdiction and there was no objection to the record on the ground that the Court had no jurisdiction to issue the attachment unless the objection to its not having jurisdiction over the plaintiffs in attachment is to be considered of that character.

I.

If it was essential to set out in the attachment proceedings that the plaintiffs therein were residents of the County of Marquette, then such omission would be fatal. But we submit that it is entirely clear that such is not the case.

The statute authorizing and regulating proceedings in attachment provides in general terms that the creditor may proceed by attachment against his debtor in the Circuit Court of the county where either the creditor or the debtor shall reside if the debtor have property therein subject to attachment.

2 Comp. Ls. of 1871, Section 6397.

The statute then proceeds to point out with precision just what the affidavit in attachment must set forth to give the court jurisdiction. And we most readily grant that these provisions must be complied with and are essential to jurisdiction. But the statute does not provide that the residence of the plaintiff shall be thus set out.

2 C. Ls., Section 6398.

In New York the statute requires in express terms that the residence of the plaintiff shall be stated in the affidavit, and under that statute it has been held and properly that an attachment is not valid unless this fact is set out.

2 N. Y. Rev. Stat., p. 64.
Staples vs. Fairchild, 3 Comst., 41.

We submit, therefore, that it is clear that there is no defect in the jurisdiction so far as the residence of the plaintiffs in attachment is concerned.

II.

The only remaining question is whether the record sufficiently shows jurisdiction over the defendant in attachment.

This involves the question how a service upon a foreign corporation is to be made so that it shall be equivalent to a personal service.

Our statutes upon this subject are very explicit.

It is provided in suits commenced by attachment against a corporation created by the laws of another State, government or county, that if a copy of such attachment and inventory shall have been personally served on any officer, member, clerk or *agent* thereof within this State, that the same proceeding shall be had thereon as in case of an attachment against a natural person which shall have been personally served.

2 Comp. Ls., Sec. 6550.

By another provision of the statutes, where personal service is made upon a defendant the same proceedings may be had therein as upon the return of an original writ of summons personally served.

2 Comp. Ls., Sec. 6413.

And there is no question but that in a suit commenced by summons personally served the plaintiff may proceed to take judgment in case of non-appearance or default, such as existed in this case.

The service upon the agent was therefore a service upon the defendant corporation. The return of the officer is *prima facie* evidence in all cases of the service upon the individual named and that he was agent, precisely as the return of a service upon an individual defendant would be presumed to be correct until otherwise appeared.

As bearing upon this question of the sufficiency of the return we cite:

French vs. La Fayette Ins. Co., 5 McLean, 461.
Affirmed, 18 How., 404.
R. R. vs. Brown, 17 Wall., 449
Farmers' Ins. Co. vs. Highsmith, 44 Iowa, 530.
Central M. L. Co. vs. Walker, 50 Iowa, 75.
Reed vs. Tyler, 56 Ill., 288.

Beyond all question it is open to the defendant in attachment or any one claiming under him to show, even when the question comes up collaterally that the person named was not the agent of the defendant at the time of the service, precisely as

THE

Supreme Court of the United States.

No. 71.—October Term, 1882.

JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, EUGENE G. ST. CLAIR, and GEORGE A. ST. CLAIR,

Plaintiffs in Error,

vs.

WILLIAM M. COX, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LEVI T. GRIFFIN,

Of Counsel.

J. L. Pearson, Printer, 9th and D sts., Washington.

THE

Supreme Court of the United States.

JULIUS N. ST. CLAIR, JAMES O. ST. CLAIR, EUGENE G. ST. CLAIR, AND GEORGE A. ST. CLAIR, Plaintiffs in Error,

vs.

WILLIAM M. COX, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Brief for Defendant in Error.

I.

THE WRIT WAS IMPROPERLY ISSUED. THE COURT FAILED TO ACQUIRE JURISDICTION OF THE CAUSE.

The statute of the State of Michigan provides:

"Issues of fact shall be tried in the proper county, as follows:

"First. Actions for the recovery of any real estate, or for the possession of any real estate; action for trespass on land and actions for trespass on the case for injuries to real estate, shall be tried in the county where the subject of the action shall be situated.

"Second. Actions of slander, for libels, and all other actions for wrongs and upon contracts, shall be tried in the county where one of the parties shall reside at the time of commencing such action, unless the court shall deem it necessary for the convenience of parties and their witnesses, or the purposes of a fair and impartial trial, to

order any such issues to be tried in some other county; in which case, the same shall be tried in the county so designated."

2 Compiled Laws, chapter 189, p. 1717, sec. 2; Compiler's section (4,970).

It is clear that it is intended by this statute that all transitory actions shall be tried in the county where one of the parties resides. The question came under discussion in Barnard vs. Hinckley, 10 Mich., 458, upon a demurrer to the declaration.

The particular point in controversy in that case was as to whether an action on the case for obstructing a navigable stream was transitory under the statute. It was held to be transitory under the statute, though local at the common law, and the learned judge delivering the opinion says: "The question of venue is one within the power of the legislature, and our statute upon this point is peculiar," referring to Compiled Laws above quoted.

The statute has at times been sought to be avoided by the profession by commencing the action in any county where the defendant may be found and then removing it to the county where the plaintiff or one of the parties reside.

The statute came before the Supreme Court again in Haywood vs. Johnson, 41 Mich., 598, and the learned judge, alluding to this practice, says:

"Finally, the legislature have distinctly indicated their sense, that under the provisions, requiring actions to be tried in particular counties and permitting a change of venue, it was not competent to begin in a county not so designated as the county for trial, and then continue the case in being by removal to the proper county."

The result of the decision is that the court has no jurisdiction unless one of the parties reside in the county where the action is brought, and the jurisdiction may be determined upon plea or upon motion based upon affi-

davits, if the facts are not of record or within judicial notice.

The case at bar is one of attachment. Parties prosecuting a suit by writ of attachment must bring themselves within the statute. It is a statutory remedy and the statute must be strictly pursued to give the court jurisdiction.

The Compiled Laws of Michigan of 1857 provide as follows:

"Sec. 1. Any creditor shall be entitled to proceed by attachment in the circuit court for the proper county, against the property of his debtor, in the cases, upon the conditions, and in the manner provided in this chapter."

The statute with reference to the venue of transitory actions was in force and is to be found in the Compiled Laws of 1857 as well as in those of 1871.

It follows, therefore, that the "proper county" in which a creditor should "be entitled to proceed by attachment" is the county in which one of the parties resides, as there is no enlargement of the remedy in this respect in the statute authorizing writs of attachment.

It is to be observed that if the debtor owned property in the county where he resided, it would be unnecessary, and in many cases unjust, to push him to trial in a county where neither party resided.

It became apparent, however, that inasmuch as the writ of attachment was directed against the property of the debtor, that there might be cases where the defendant debtor resided in one county without property, but had property in another, which a creditor might deem it advisable to reach.

The legislature of 1864, therefore, amended this section, so as to make it read as follows:

"SEC. 1. Any creditor shall be entitled to proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or in case of

joint debtors, either of them) shall reside, if the debtor have property subject to attachment in said county; and in case the debtor has no property in said county, or is a non-resident of this state, then in the circuit court of any county where the property of the debtor subject to attachment may be found, in the cases, upon the conditions, and in the manner provided in this chapter."

Session Laws of 1861, Act No. 229, p. 477.

2 Compiled Laws 1871, Chap. 1201, p. 1802; Compiler's section (6397).

No amendment has since been made.

It may be remarked here that one of the grounds upon which a creditor may take out an attachment, both under Compiled Laws of 1857 and 1871, is that the defendant is a foreign cnrporation.

See Compiled Laws last above cited (6398), subdivision sixth.

Under Compiled Laws of 1871, above cited, the plaintiff can commence his suit by attachment,—

a. In the county where the creditor resides; or,

b. In the county where the debtor resides, "if the debtor have property subject to attachment in said county."

Now, it is probable that inasmuch as the writ of attachment is of a duplex character—a command to the sheriff to levy upon property, and also a summons to the defendant—that the creditor could maintain his action, if commenced by writ of attachment in the county where the debtor resides, although he found no property therein, and that the writ of attachment would operate as a summons.

We conceive that the real object of the clause, "if the debtor have property subject to attachment in said county," is to emphasize and decisively mark the cases in which a writ of attachment may issue in a county where neither of the parties reside, and so we have one other case in which the writ may issue.

c. "In case the debtor has no property in said county, or is a non-resident of this state, then in the circuit court

in the county where the property of the debtor subject to attachment may be found."

Unless the affidavit or writ of attachment brings the creditor within some one of these three provisions, he is not entitled to take out his writ; neither is he entitled to take out his writ upon the third ground, unless the second ground is wanting. In this case neither the affidavit nor the writ shows—

a. That the creditor resides in the county of Marquette; or,

b. That the debtor resides in the county of Marquette, or has property subject to attachment in said county; or,

c. That the debtor resides in some other county, but has property in the county of Marquette, or is a non-resident of the state.

The circuit court for the county of Marquette did not, therefore, acquire jurisdiction of the cause.

It is true that the affidavit may be said to assert the residence of George A. St. Clair in said county, but this would not be sufficient. It is clear upon general principles that the statute means all of the parties on one side, unless exception is made, and this is apparent from the fact that in the case of *joint debtors* an exception *is* made, and the writ may be taken out in the county where either of them resides.

It may be said that it is unnecessary that these requisites should appear in the affidavit or the writ. We answer that it is necessary that everything should appear in the affidavit or writ essential to give the court jurisdiction under the statute. If a summons or writ of attachment is taken out of the circuit court of the United States, in ordinary cases of contract between the creditor and debtor, it must appear that they are citizens of different states.

In analogy to this doctrine, it has been held by the Supreme Court of Michigan that the residence of parties

must appear in the summons or the declaration in cases brought in the Superior Court of Detroit, the act in relation to which confines the right of action to those causes where one of the parties resides in the city.

See Bagley vs. Pridgeon, 42 Mich., 550.

It seems to us that it cannot be contended that the declaration aids the matter, in averring that the defendant is a foreign corporation, because the suit was commenced by writ, and the court in such cases, if it obtains jurisdiction at all, must acquire it before the filing of the declaration.

But it may be said that it is sufficient that *the return of the officer* shows that either of the requisites is present which will authorize the issuing of the writ of attachment. We have already observed that jurisdiction of the court must be shown long anterior to the return of the officer; otherwise the question of jurisdiction might be in suspension for several months.

Further than this, however, the return of the officer does not show a case which, under the statute, would authorize the issuing of the writ. The sheriff returns that he attached "the following described personal property of the Winthrop Mining Company, defendant, in said county of Marquette, to wit: Two (2) pockets of hematite ore at the Winthrop mine, containing about one hundred and fifty tons (150).

"Twenty (20) cars of hematite ore on the track of the Winthrop Mine, containing five and a half ($5\frac{1}{2}$) tons each."

This shows that personal property of the defendant company was attached in the county of Marquette; it shows nothing else. It does not show:

a. That the defendant company is a resident of Marquette County within the meaning of the statute; that is, that it carries on business and has an established agency at that point, or any other of the requisites which may make a corporation a resident;

b. It does not show that it is a foreign corporation or a "non-resident of this State," (Michigan); or,

c. It does not show that, being a resident in a particular county, it has no property in that county, making it necessary for the creditor to resort to Marquette County. One of these three things must appear in order to give the court jurisdiction.

It would hardly be contended, even argumentatively, that because the Winthrop Mine is mentioned, which must have a locality, that it is to be assumed, for the purpose of giving the court jurisdiction, that the Winthrop Mine belongs to the defendant company. The case would be no different if the Argyle Mine was mentioned or any other mine. The company, even if they ever owned the Winthrop Mine, may have parted with that ownership for years. Nothing can be inferred or presumed in this respect.

Having shown that there was nothing in the return of the seizure of the property which authorized the issuing of the writ, the inquiry may next be directed towards the return of personal service. We shall have occasion to comment upon this return hereafter; but for the present it is sufficient to say that there is nothing in the return which shows that the defendant company—

a. Is a foreign corporation, or

b. Was carrying on business or had any established agency in the county of Marquette, or

c. Was a resident of any other county in which it had no property, and that it had property in the county of Marquette.

II.

If writ was properly issued, the service was not such as to give the court jurisdiction.

It devolves upon the plaintiff in error to make error clearly appear. Was this a foreign or a domestic corporation?

1. As to domestic corporations.

The statute provides:

"Suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct."

2 Comp. Laws 1871, Sec. 6544, p. 1837.

This section has been amended so as to allow service "upon the operator or agent in charge of any office or place of business of any telegraph company."

Sess. Laws 1877, act No. 123, p. 112.

These provisions apply to foreign as well as domestic corporations and contain the legislation of the state bearing upon the question in controversy.

It is clear, therefore, that if the suit against the Mining Company had been commenced by summons or declaration the service would not have been good, whether a foreign or domestic corporation.

There is no special provision as to suits commenced by attachment in cases of domestic corporations, and it is clear therefore that if the Mining Company was a domestic corporation the service of the writ of attachment was not good.

There is no showing in the writ or affidavit whether the defendant company is a domestic corporation or otherwise; but it is contended that it is sufficient that an averment appears in the declaration; we reply that the averment in the declaration cannot fix the character of the corporation with reference to the service of a writ which is in itself prior in time to the declaration, else the question of jurisdiction might be in a state of suspension,

awaiting the action of the pleader, and shifting according to his views of the necessity of inserting it in the declaration.

2. As to foreign corporations:

In cases of foreign corporations there is a special provision for service of writs of attachment.

The statute provides:

"In suits commenced by attachment in favor of a resident of this state, against any corporation created by or under the laws of any other state, government, or country, if a copy of such attachment, and of the inventory of property attached, shall have been personally served on any officer, member, clerk, or agent of such corporation within this state, the same proceedings shall be thereupon had, and with the like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant."

2 Comp. L. 1871, Sec. 6550, p. 1839.

a. If the Mining Company was a foreign corporation the service can be made under the provision of this statute only, "*in favor of a resident of this state*" (Michigan).

There is no showing anywhere that the St. Clairs, plaintiffs in the writ, were residents of the state, and the service is fatally defective in this respect.

b. If the Mining Company was a foreign corporation, *and the plaintiffs are residents of the state*, the service is within Comp. L., Sec. 6550, providing the party upon whom the writ was served *was then an agent of such corporation within this state.*

The language of the return is:

"Upon the said defendant by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county of Marquette."

Is this *prima facie* evidence of the character of Colwell? The question has not been determined by this court so far as we have discovered.

In *Bloom vs. Burdick*, 1 *Hill*, 130, it is said that the usual presumption in favor of the performance of official duty should have little weight where it is resorted to for the purpose of making out a vital jurisdictional fact. p. 136.

In *Angier vs. Ash*, 26 *N. H.*, 99, it is said to be well settled "that the return of an officer of his doings by virtue of any process which it is his duty to return duly made is *prima facie* evidence."

In *Owen vs. Roustead*, 22 *Ill.*, 161,—Held that the return of the sheriff of service on the defendant is only *prima facie* evidence. But that was a personal service. A bill in equity was filed for relief against the judgment on the ground that the return was untrue. Held that an action for a false return was not always an adequate relief and that equity would take jurisdiction.

In *Rowe vs. Table Mountain Co.*, 10 *Cal.*, 441,—Held that the return of service on the president and secretary is *prima facie* evidence that the persons named in the return were such officers.

The correctness of the decision is expressed with some doubt, but it is said that in the absence of any showing that these officers were not such, the judgment should stand.

In *Wilson vs. Spring Co.*, 10 *Cal.*, 445, following the last case,—Held that it is evidence that P. was a partner and associate in a trading company.

In *Ingraham vs. McGraw*, 3 *Kan.*, 521,—Held that it will be presumed that the place where the copy of summons was left was the usual place of residence of defendant, if so returned.

In *Kingsley vs. Buchanan*, 11 *Iowa*, 387,—Held return of sheriff *prima facie* evidence;—but this is only to the point that an attachment made by a sheriff, and the certificate of the sheriff, are evidence as to taking and holding property by attachment.

None of these cases quite reach the question in controversy, and upon principle we maintain that it should never be left to an officer to determine the representative character of a party, except at the peril of being able to prove it as a fact, if the point is challenged.

c. Does this return show a service upon an agent within this state (Michigan), within the meaning of the statute?

We submit not.

It must be somewhere shown that such a corporation exists within the state, has a recognized existence, is carrying on business, or has an established agency.

This doctrine is recognized—

By Mr. Justice Matthews:

Mohr vs. Insurance Co., 12 *F. R.*, 474, in which it is said:

Where foreign corporations *establish agencies in a state*, they are "*found*" *within the district in which such agent is doing business.*

By Judge Wallace:

Merchants' Manuf'g Co. vs. G. T. R'y Co., 13 F. R., 358, where it is said:

When a foreign corporation *avails itself of the privileges of doing business in a state*, it consents to such mode of service as the laws of the state provide.

By Judge Hughes:

Dana vs. Virginia Fire and Marine Ins. Co., 13 Reporter, 457.

By Judge Baxter:

McCoy vs. C. I., St. L. & C. R. R. Co., 12 F. R., 3, in which it is said that when foreign corporations *engage in business in a state*, and service is made on an agent, &c., they are "found" in the district in which *such agent is doing business.*

The record fails to show that the company had *established an agency in the state*, or had *availed itself of the privileges of doing business in a state*, or *was carrying on business at all in the state*, and for aught that appears Colwell was a casual visitor on a tour of observation, inspecting the mines of Lake Superior for his own amusement and instruction. Surely under such circumstances he could not carry with him his representative character, if he possessed one.

See Newell vs. G. W. R. Co., 19 Mich., 336.

Colwell was not, therefore, served or "found" *within the state*, within the meaning of the statute.

"A foreign corporation is 'found' in the district where its agent is served, *when it does business there.*'"

Wallace, C. J., in M. M. Co. vs. G. T. R'y Co., above cited.

III.

If the court erred, it was error without prejudice.

Meeker testifies: "That in 1876 Colwell was made superintendent of the Winthrop Mining Company on a salary and resigned December 1st, 1876, and then took a contract to mine the ore at a fixed price per ton, and ceased all connection officially with the company. That after that time the Winthrop Mining Company had no agent in Michigan and none was required. That they had made a lease with Colwell—made a contract at a fixed price to put the ore on the cars from the 1st of December, 1876."

The question of agency was not a question for the jury.
Carr vs. Com. Bank of Racine, 16 Wis., 50.

And if it was, there was no evidence opposed and none suggested as in existence.

If the exemplification had been admitted the instruction of the court must have been the same.

In Cleveland vs. The New Jersey Stmbt. Co., 15 N. Y. Weekly Dig., 157, (decided June 2, 1882,)—

Held by New York Court of Appeals that it was error to submit to the jury a question not in dispute under the evidence.

In Seligman vs. Ten Eyck's Estate, 13 N. W. Rep., 377, (opinion filed October 4, 1882,)—

Held by Supreme Court of Michigan that it was erroneous to direct the attention of the jury to undisputed facts as if they were doubtful.

We submit that, whether the exemplification was or was not admitted, the verdict must have been the same.

LEVI T. GRIFFIN,
Of Counsel for Defendant in Error.

16-360

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1033.

CHARLES H. VAN WYCK, APPELLANT,

vs.

SHERMAN W. KNEVALS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 10, 1882.

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1, 2 UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of Nebraska, ss:

Pleas before the honorable Elmer S. Dundy, district judge for said district, and one of the judge*s* of the circuit court of the United States for the district of Nebraska, sitting in said court at the term of May, 1882, and on the 11th of September, 1882.

On the 24th day of December, 1879, Sherman W. Knevals filed in said circuit court his bill of complaint as follows, in equity:

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Sherman W. Knevals, of the city and State of New York, and a citizen of said State, brings this his bill against Charles H. Van Wyck, of Nebraska City, in the State of Nebraska, and a citizen of said State.

And thereupon your orator complains and says:

I. On and long before the 23rd of July, 1866, the Saint Joseph and Denver City Railroad Company became and was a corporation, organized under the laws of the State of Kansas, for the purpose and with the corporate power of constructing and operating a railroad from Elwood, in said State, westwardly, via Marysville, in the same State, to a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude.

II. On the 23rd of July, 1866, Congress passed an act entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," which was approved on that day. The said act is printed in the 14th volume of the
3 United States Statutes at Large, at page 210, and is hereto annexed. On the 9th of October, 1866, the board of directors of the Saint Joseph and Denver City Railroad Company, at a meeting held in Elwood, in the State of Kansas, on that day passed a resolution reciting the act last-above entitled, and resolved to accept the same and the terms, conditions, and impositions thereof, and directed its president and secretary to file with the honorable the Secretary of the Interior a certified copy under the company's seal of that its resolution and the proceedings of said company accepting the terms, conditions, and impositions contained in said act. And accordingly, on the 2nd of November, 1866, the president and secretary of said company made, under their hands and the seal of said company, such instrument of acceptance; which instrument was, on the 11th of December, 1866, duly filed with the Secretary of the Interior.

III. From the 6th of January, 1870, to and after the 20th of March of that year, Eldridge Whiting was the chief engineer of said company, and, as such, had general charge of the location of the line of said road and the surveys in reference thereto, and employed, as deputy or division engineers of said company on said work, Albert A. Robinson, William L. Smith, and J. A. McMurtrie. Under the general supervision of said chief engineer, the said deputy or division engineers, during the period last aforesaid, actually surveyed and marked upon the ground the line or route of said railroad from the town of Hiawatha to a junction with the

Union Pacific Railroad, at the southwest corner of section thirty-six in township nine north, of range sixteen west, in the State of Nebraska, which said line or route ran through Thayer County, in said State, and that part thereof was by the said engineers actually surveyed and marked on the ground in the month of February and before the 15th of March, 1870. And in like manner, and before the 1st of January, 1870, the line of route of said company's road from Elwood to Hiawatha had been actually surveyed and marked on the ground.

4 IV. The engineers of said company having made a topographical map of the country through which ran the said line or route of said road, and on which the government surveys and the said line or route were delineated, so that its exact location appeared thereon, with reference as well to the sections of public lands as to the towns, counties, and rivers in said region, at a meeting of the board of directors of said company, held at Elwood on the 21st of March, 1870, the said map and the line or route of said road delineated thereon were presented, considered, and approved by a resolution of said board; and on the 21st of March, 1870, the said map whereon were delineated the said route as aforesaid, and also due evidence of the location thereof and the aforesaid action of the directors of said company, was filed with the Secretary of the Interior, who duly accepted the same, and on the said day he transmitted the same to the Commissioner of the General Land Office to be filed in that office.

V. On the 8th of April, 1870, the Commissioner transmitted a copy of said map to the register and receiver of the land office at Beatrice. The register of said office acknowledged the same by his letter under date of April 13th, 1870.

VI. The said company built and completed on the first of October, 1869, ten miles of its road from its initial point at Elwood; ten miles on the 15th of October, 1869; the next twenty miles on the 10th of December, 1869; the next thirty miles on the 1st of May, 1870, and the next forty miles on the day of , 1870, being the remainder of its road to Hastings, where it made a junction with the Burlington and Missouri River Branch of the Union Pacific Railroad. The road so by it built was upon the line or route delineated on the map aforesaid, and the said road, constructed as aforesaid thereon, ran through Thayer and Nuckolls Counties, which are within the district of lands subject to sale at Beatrice; and each section of ten consecutive miles of road was built and completed within the time in that behalf limited in the said act, save the first sixty

5 miles thereof; and the whole line of said road was built and completed to a junction with the said Burlington and Missouri River Branch of the Union Pacific Railroad within ten years of the acceptance by the Saint Joseph and Denver City Railroad Company of the grant made to it by the act of July 23rd, 1866.

VII. As each consecutive section of ten miles of said road, beginning at the initial point at Elwood, was completed in a good, substantial, and workmanlike manner as a first-class railroad, the governor of the State of Kansas made his certain certificate in due form and duly attested by him, whereby he certified to the honorable the Secretary of the Interior that such section was completed in manner aforesaid; and finally when the road was completed from Elwood to Hastings at the date hereinbefore in that behalf stated, the governor in manner aforesaid duly certified to the Sec-

retary that the said road and the whole thereof had been completed in manner aforesaid.

VIII. On the 14th day of May, 1870, the said St. Joseph and Denver City Railroad Company made and issued its several bonds for a large aggregate sum, by which it promised to pay the said sum within a day therein fixed; and in order to secure its said bonds it made its certain indenture of mortgage between it as party thereto of the first part and the Farmers' Loan and Trust Company as the party of the second part, whereby it mortgaged to said trust company among other things the lands granted to it by Congress by the said act of July 23rd, 1866, in order to realize the funds to construct its said road, and the same were exclusively applied to that purpose; and no parts of said lands or of the proceeds of its said bonds were applied to aid in the construction of any other railroad or part thereof. The said company having made default in the payment of said bonds or a part thereof, as the same by their terms became due, on the 15th of January, 1874, the said trust company exhibited its bill of complaint in this court against said railroad company for the foreclosure of said mortgage and the sale of the mortgaged premises. And such proceedings were had thereupon that on the 13th of November, 1874, and the 10th of
6 July, 1875, two several decrees were rendered by said court, whereby among other things it was ordered and decreed that the said mortgage be foreclosed and the lands granted to said railroad company as hereinbefore stated, and by it mortgaged to said trust company, be sold by and under the direction of one of the masters of said court. In pursuance of said decree, the master of said court in the said decree named and in that behalf empowered duly sold said lands to George J. Forest, J. Augustus Johnson, and John J. McCook, and the said master having reported his proceedings upon said sale to said court as in the said decree required, on the 13th day of November, 1874, the said court made its certain order in said cause, confirming said sale and the proceedings of the master in that behalf, and directed said master to make to said purchasers his master's deed conveying the said lands to them; accordingly said master, that is to say, Whitaker M. Grant, as master of the said court, and in pursuance of the said order and decree thereof, made his certain indenture of conveyance bearing date on said day between himself as party of the first part and the said George J. Forest, J. Augustus Johnson, and John J. McCook, as parties of the second part thereto, and reciting therein the said decree and order and the proceedings thereon, as is usual in such instruments, and thereby the said party of the first part thereto conveyed to the said parties of the second part thereto the lands hereinbefore referred to. Afterwards the said George J. Forest, J. Augustus Johnson, and John J. McCook by their certain indenture of conveyance of that date, made between them as parties of the first part and the Kansas and Nebraska Railway Company, a corporation duly organized under the laws of the State of Kansas, of the second part, conveyed to said company the lands above referred to. On the 23rd day of September, 1876, the said company by its indenture of conveyance of that date, made between it as party thereto of the first part and Henry H. Butterworth and Charles W. Hassler as parties thereto of the second part, conveyed to said parties of the second part the lands aforesaid. On the 17th day of May, 1878, the said Butterworth and Hassler, by their certain
7 indenture of conveyance of that date, made between them as par-

ties thereto, first part, and your orator as party thereto of the second, conveyed to your orator certain of the aforesaid lands, and among them that certain piece or parcel of land known and described as follows, that is to say: Section seven (7) in township four (4) north, of range three (3) west, in Thayer County; section one (1) in township four (4), range four west, in said county; which said parcels of land were granted by Congress to said railroad company by said act of July 23rd, 1866, and included in the mortgage aforesaid, made by said company to said trust company and sold under the said decree, and conveyed by the several mesne conveyances hereinbefore mentioned. The said land is within ten miles of the said railroad, and when the line of route of said road had been definitely fixed, as hereinbefore stated, it had not been sold by the United States, nor had the right of pre-emption or homestead settlement attached thereto, nor had the same been reserved by the United States for any purpose whatever.

IX. On or about the 11th day of April, 1870, the said defendant Van Wyck purchased the said parcel of land above described from the United States by private entry thereof at the aforesaid land office at Beatrice, paying therefor one dollar and twenty-five cents per acre, and letters patent of the United States were issued to him out of the land department of the Government, and by virtue of such title and against your orator he claims to own the said lands in fee. The said lands are of the value of one thousand dollars and over. When the certificate of the said governor of Kansas was presented to the Secretary of the Interior, and when the same was on file in his office—that is to say, on the 1st of January, 1870—the said railroad company applied to the said Secretary to issue to it a patent for the parcel of land hereinbefore described, tendering payment of such fees and charters as in the said land department are required for such service, but the Secretary refused to issue the same to said company, and although the said company repeatedly and properly ap-

8 plied to the said Secretary for a patent for said parcel of land, insisting to him that the said entry by the said Van Wyck, defendant, had been made after its line had been definitely fixed, and therefore after its said grant had become located and operated, yet he refused, and has ever since refused, to issue the said patent either to said company or its assigns.

And your orator has repeatedly and in a friendly manner applied to the said defendant to convey the said land to him.

Wherefore your orator submits that the said defendant holds the legal title to said parcel of land in trust for him, and ought to convey the same to him in fee, and your orator well hoped that he would do so.

In tender consideration thereof, and forasmuch as your orator is without remedy, save in this court, where matters of this and the like nature are properly cognizable and relievable:

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, information, remembrance, and belief, full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that it be by the decree of your honors declared that on the 28th day of March, 1870, the line or route of the road of the Saint Joseph

and Denver City Railroad Company was definitely fixed, and the grant to it by the act of Congress of July 23rd, 1866, became located and operative, so that upon the construction of its road in manner prescribed by said act, and the advertisement thereof to the Secretary of the Interior, as therein required, it became and was entitled to a patent to the parcel of land above described; that the said patent was issued to and received by the said defendant Van Wyck in trust for said company and not otherwise; and the title thereunder is now held by said defendant in trust for your orator; and that it be decreed that by an instrument of conveyance in form to be approved by your honors the said defendant convey the said parcel of land to your orator; and that the said defendant pay
9 the costs of this suit; and that your orator may have all such other and further relief as the circumstances of the case require and is agreeable to equity:

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Charles H. Van Wyck, therein and thereby commanding him on a certain day, and under a certain penalty to be therein inserted, that he personally be and appear before your honors in this court, then and there to answer the premises and stand to and abide by and perform such order and decree therein as to this court shall seem proper and as shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

J. M. WOOLWORTH,
Solicitor and of Counsel for Pl'ff.

Attached to said bill is an exhibit marked A, which is in the words and figures following, to wit:

EXHIBIT A.

Chap. CCXII.—An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there is hereby granted to the State of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly via Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road to the point of intersection. But in case it shall appear that the United States have, when the line or
10 route of said road is definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to

tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to whi'h the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid shall be held by the State of Kansas for the use and purpose aforesaid; provided, that the land to be so selected shall in no case be located farther than twenty miles from the line of said road; provided further, that the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided; p'ovided also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of lands or bonds have been made by Congress; and provided further, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for *for* the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as may be found necessary to locate the route of said road through said lands; in which case the right of way of one hundred feet on each side of said road only shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, that the sections and parts of
11 sections of land which by said grant shall remain to the United States, within ten miles of each side of said road, shall not be sold for less than double the minimum price of public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the increased minimum price as aforesaid; provided, that actual and bona fide settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at an increased minimum price aforesaid; and provided also, that settlers on any of the said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, that the grant of lands hereby made is upon the condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the government when required to do so by any department thereof, the government having at all times the preference in the use of the road for all the purposes aforesaid at fair and reasonable rates of compensation, not exceeding that paid by private individuals or the average paid for like services on other roads. And the land, hereby granted, held, and reserved, as aforesaid, shall inure to the benefit of said company, as follows: When the governor of the State of Kansas shall certify that any section

of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to said company patents for so many sections of the land hereinbefore granted as lie opposite to and
12 coterminus with the said completed sections. And when certificates of the governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of land as aforesaid for each of said sections of road until said road shall be completed; provided, that if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its rights for the land for said section so failing of completion shall revert to the government of the United States; provided further, that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made the lands remaining unpatented shall revert to the United States.

SEC. 4. And be it further enacted, that as soon as the said company shall file with the Secretary of the Interior maps of its lines designating the route thereof it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

SEC. 5. And be it further enacted, that the United States mail shall be transported on said road and its extension under the direction of the Post-Office Department at such price as Congress may by law provide; provided, that until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

SEC. 6. And be it further enacted, that the right of way through public lands be, and the same is hereby, granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for
13 station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water-stations.

SEC. 7. And be it further enacted, that the acceptance of the terms, conditions, and impositions of this act by the said Saint Joseph and Denver City Railroad Company shall be signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within six months after the passage of this act and not afterwards, and shall be deposited with the Secretary of the Interior.

Approved July 23d, 1866.

Said bill of complaint is endorsed as follows: No. 218 E. Filed Dec. 24, 1879. Watson B. Smith, clerk.

On the 5th day of January, 1881, Charles H. Van Wyck filed his answer to said bill, as follows:

In the circuit court of the United States for the district of Nebraska. In equity.

The answer of Charles H. Van Wyck, the defendant to the bill of complaint of Sherman W. Knevals, complainant:

The said defendant now, and at all times hereafter, saving and reserving unto himself all manner, benefit, and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as the defendant is advised is or are material or necessary for him to make answer unto, the defendant answering, saith:

He has been informed and believes it to be true that on the 23rd of July, 1866, Congress passed an act entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph," which was approved on that day. The said act is printed in the 14th volume of the United States Statute' at Large,
14 at page 210, and is annexed to complainant's said bill.

And the said defendant, further answering said complainant's said bill, saith that he is informed and believes it to be true that on or about the 4th day of April, A. D. 1870, Charles H. Wyck purchased the said parcel of land from the United States by private entry thereof, at the said land office at Beatrice, paying therefor $1.25 per acre, and on or about the 1st day of November, 1871, letters patent of the United States were duly issued to him out of the land department of the government. The title thereto so by him acquired has come to the defendant, Charles H. Van Wyck, who, by virtue of such title, and against the said complainant, claims to own the said parcel of land in fee; that the said lands are of the value of ten thousand dollars and over.

And defendant, further answering said complainant's said bill, saith he knows not, and has not been informed save by the said complainant's said bill, and cannot set forth *sa* to his belief or otherwise whether or or before or after the 23rd of July, 1866, the Saint Joseph & Denver City Railroad Company became and was a corporation, organized under the laws of the State of Kansas, for the purpose and with the corporate power of con*tract*ing and operating a railroad from Elwood, in said State, westwardly, via Marysville, in the same State, to a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundre'th meridian of west longitude, as in the said complainant's bill alleged, and therefore denies the same, and leaves the said complainant to make such proof thereof as he shall be able to produce.

And the defendant, further answering, saith he knows not, and has not been informed save by the said complainant's said bill, and cannot set forth as to his belief or otherwise whether on the 9th day of October, 1866, the board of directors of the Saint Joseph & Denver City Railroad Company, at a meeting held at Elwood, in the State of Kansas, on that day passed a resolution reciting the act of Congress of July 23rd, 1866, hereinbefore referred to, and resolved to accept the same and the terms, condi-
15 tions, and impositions thereof, and directed its president and secretary to file with the Secretary of the Interior a certified copy of said resolution and the proceedings of said company, accepting the terms, con-

ditions, and impositions contained in said act; nor whether, on the 2nd of November, 1866, the president and secretary of said company made, under their hands and the seal of said company, such instrument of acceptance, and filed said instrument on the 11th of December, A. D. 1866, with the Secretary of the Interior, as alleged in said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the defendant, further answering, saith he knows not, and has not been informed save by the complainant's said bill, and cannot set forth whether from the 6th of January, 1870, to and after the 20th of March of that year Eldridge Whiting was the chief engineer of said company, and, as such, had general charge of the location of the line of said road and the surveys in reference thereto, and employed as deputy or division engineers of said company on said work Albert A. Robinson, William L. Smith, and J. A. McMurtrie; nor whether, under the general supervision of said chief engineer, the said deputy or division engineers, during the period last aforesaid, actually surveyed and marked upon the ground the line or route of said railroad from the town of Hiawatha to a junction with the Union Pacific Railroad at the southwest corner of section thirty-six, in township nine north, of range sixteen west, in the State of Nebraska, which said line or route ran through Thayer and Nuckolls counties in said State, and that part thereof was by the said engineers actually surveyed and marked upon the ground in the month of February and before the 15th of March, 1870; nor whether, in like manner, and before the 1st of January, 1870, the line or route of said company's road from Elwood to Hiawatha had been actually surveyed and marked on the ground, as in said complainant's bill alleged, and therefore denies the same, and leaves the said complainant to make such proof thereof as he may be able to produce.

16 And the defendant, further answering, saith he knows not, and has not been informed save by the said complainant's said bill, and cannot set forth whether the engineers of said company having made a topographical map of the country through which ran the said line or route of said road, and on which the government surveys and the said line or route were delineated, so that its exact location appeared thereon, with reference as well to the sections of public lands as to the towns, counties, and rivers in said region, at a meeting of the board of directors of said company, held at Elwood, on the 21st of March, 1870, the said map and the line or route of said road delineated thereon were presented, considered, and approved by a resolution of said board; nor whether, on the 27th of March, 1870, the said map, whereon were delineated the said route as aforesaid, and also, on evidence of the location thereof and the aforesaid action of the directors of said company, was filed with the Secretary of the Interior, who duly accepted the same; nor whether, on said day, he transmitted the same to the Commissioner of the General Land Office to be filed in that office, as alleged in said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith he knows not and has not been informed save by the said complainant's said bill, and cannot set forth whether on the 8th of April, 1870, the Commissioner transmitted a

copy of said map to the register and receiver of the land office at Beatrice; nor whether the register of said office acknowledged the same by his letter under date of April 13th, 1870, as alleged in said complainant's said bill, and therefore denies the same, and leaves the complainant to make such proof as he may be able to produce.

And the said defendant, further answering, saith he knows not whether the said company built and completed on the 1st of October, 1860, ten miles of its road from its initial point at Elwood; ten miles on the 15th of October, 1869; the next twenty miles on the 10th of December,
17 1869; the next thirty miles on the 1st of May, 1870, and the next forty miles on the day of 1870, being the remainder of its road to Hastings, where it made a junction with the Burlington and Missouri River branch of the Union Pacific Railroad; nor whether the road so by it built was upon the line or route delineated on the map aforesaid; nor whether each section of ten consecutive miles of road was built and completed within the time in that behalf limited in the said act, save the first sixty miles thereof; nor whether the whole line of said road was built and completed to a junction with the said Burlington & Missouri River branch of the Union Pacific Railroad within ten years of the acceptance by the Saint Joseph & Denver City Railroad Company of the grant made to it by the act of July 23rd, 1866, as alleged in said complainant's bill, but has been informed that said averments are not true, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith he knows not and has not been informed, save by the said complainant's said bill, and cannot set forth whether, as each consecutive section of ten miles of said road beginning at the initial point at Elwood was completed, the governor of the State of Kansas made his certain certificate in due form and duly attested by him, whereby he certified to the honorable Secretary of the Interior that such section was completed in manner aforesaid; nor whether when the road was completed from Elwood to Hastings, at the date in that behalf hereinbefore stated, the governor in manner aforesaid duly certified to the Secretary that the said road and the whole thereof had been completed in manner aforesaid as alleged in said complainant's bill, and therefore denies the same and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith he knows not whether on the 14th of May, A. D. 1870, the said Saint Joseph & Denver City Railroad Company made and issued its several bonds for a large aggregate sum, by which it promised to pay the said sum within a
18 day therein fixed; and in order to secure its said bonds, it made its certain indenture of mortgage between it as party thereto of the first part, and the Farmer's Loan and Tru't Company as the party of the second part, whereby it mortgaged to said trust company, among other things, the lands granted to it by Congres', by the said act of July 23rd, 1866, in order to realize the funds to construct its road, and the same were exclusively applied to that purpose; nor whether any part of said lands, or of the proceeds of said bonds, were applied to aid in the construction of any other railroad or part thereof; nor whether the said company having made default in the payment of said bonds, or a part thereof, as the

came by their terms became due, on the 15th of January, 1874, the said trust company exhibited its bill of complaint in this court, against said railroad company, for the foreclosure of said mortgage and the sale of the mortgaged premises; and such proceedings were had thereon, that on the 13th of November, 1874, and the 10th of July, 1875, two several decrees were rendered by said court whereby, among other things, it was ordered and decreed that the said mortgage be foreclosed and the lands granted to said railroad company, as hereinbefore stated, and by it mortgaged to said trust company be sold by, and under the direction of, one of the masters of said court; nor whether in pursuance of said decree the master of said court, in the said decree named, and in that behalf empowered, duly sold said lands to George J. Forest, J. Augustus Johnson, and John J. McCook, and the said master having reported his proceedings upon said sale to the said court, as in the said decree required, on the 14th day of November, 1874, the said court by its certain order in the said cause, confirming said sale and the proceedings of the master in that behalf, and directed the said master to make to said purchasers his (master's) deed, conveying the said lands to them; accordingly said master, that is to say, Whitaker M. Grant, as master of the said court, and in pursuance of the said order and decree thereof, made his certain indenture of conveyance bearing date on said day, between himself, as party of the first part, and the said George J. Forest, J. Augustus Johnson, and John J. McCook, as
19 parties of the second part thereto, and reciting therein the said decree and order and the proceedings thereon, as is usual in such instruments, and thereby the said party of the first part thereto conveyed to the said parties of the second part thereto the lands hereinbefore referred to; nor whether afterwards the said George J. Forest, J. Augustus Johnson, and John J. McCook, by their certain indenture of conveyance of that date made between them as parties of the first part and the Kansas and Nebraska Railway Company, a corporation duly organized under the laws of the State of Kansas of the second part, conveyed to said company the lands above referred to; nor whether on the 23rd day of September, 1876, the said company by its indenture of conveyance of that date made between it as party thereto of the first part and Henry H. Butterworth and Charles W. Hassler as parties thereto of the second part, conveyed to the parties of the second part the lands aforesaid; nor whether on the 17th day of May, 1878, the said Butterworth and Hassler by their certain indenture of conveyance of that date, made between them as parties thereto of the first part and your orator as party thereto of the second part, conveyed to your orator certain of the aforesaid lands and among them that certain piece or parcel of land known and described as follows, that is to say: Section seven (7), in township four (4) north, of range three (3) west, of the 6th p. m., in Thayer County, Nebraska; also section one (1) in township four (4) north, of range four (4) west, of said 6th p. m., also in said county of Thayer, which said parcel of land the complainant avers was granted by Congress to said railroad company by said act of July 23rd, 1866, and was included in the mortgage aforesaid, made by said company to said trust company and sold under the said decree and conveyed by the several mesne conveyances hereinbefore mentioned; but as the defendant has been informed and believes that the foregoing averments and

allegations as set forth in the said complainant's bill are not true, he therefore denies the same.

And the said defendant, further answering, saith he knows not and has not been informed save by the said complainant's said bill and cannot set forth whether any certificate of the governor of Kansas was
20 ever presented to the Secretary of the Interior or filed in his office; nor whether on the 1st of January, A. D. 1870, the said railroad company applied to the said Secretary to issue to it a patent for the said parcel of land hereinbefore described, tendering payment of such fees and charges as was required in the said land department as alleged in said complainant's bill, and therefore denies the same and leaves the said complainant to make such proof thereof as he shall be able to produce.

And the said defendant, further answering said complainant's said bill, saith that the road built by the said Saint Joseph & Denver City Railroad Company was not upon the line of route delineated upon the map set forth in the complainant's bill as filed with the Secretary of the Interior; and that the whole line of said road was not built or completed so as to effect a junction with the said Union Pacific Railroad or any branch thereof; and the said Burlington & Missouri River Railroad is not a branch of the Union Pacific Railroad.

And the defendant, further answering, saith he has been informed and believes that it is not true that when the line or route of said road had been definitely fixed as stated in the said complainant's bill that the said parcel of land had not been sold by the United States, nor had the right of pre-emption or homestead settlement attached thereto, nor had the same been reserved by the United States for any purpose whatever, as alleged in the said complainant's said bill, and therefore denies the same.

And the said defendant, further answering, saith that as to any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not hereinbefore well and sufficiently answered, confessed, traversed, and avoided or denied, he knows not of and has not been informed save by said bill of complaint, and therefore denies the same and leaves the complainant to make such proof thereof as he may be able to produce.

11. And the defendant, for a further answer to the said complainant's said bill, saith that the said St. Joseph & Denver City Railroad Company was not on the 23rd day of July, 1866, nor at any other time prior to the
21 day of A. D. 1873, a corporation or authorized to exercise the powers or the rights conferred upon railroad corporations under and by virtue of the laws of the State of Nebraska; that said railroad company did not file articles of incorporation with the secretary of state of the State of Nebraska, nor did said railroad company adopt articles of incorporation and have them recorded in the office of the county clerk of the counties of Jefferson, Thayer, Nuckolls, Clay, or Adams, or any other county in the State of Nebraska in which said railroad did business prior to the day of , A. D. 1873, as required by the statutes of the State of Nebraska. And defendant saith that said railroad company did no act or thing whatever to comply with an act of the legislature of the State of Nebraska entitled "An act to authorize non-resident railroad companies to build roads in Nebraska." or with any other act of the legislature of the State of Nebraska pertaining to said subject prior to

the date last aforesaid, and not until long after this defendant acquired his title to said parcel of land from the Government of the United States as her'inbefore stated and set forth. And the defendant alleges the fact to be that the said railroad company did not acquire any right or title to the said parcel of land, either equitable or otherwise, until the daid day of , 18 , and long after this defendant purchased the same as aforesaid. Wherefore the defendant insists that his rights are prior to any pretended rights or equities of the said railroad company or its grantees, and that any pretended rights or equities of said company and its grantees are subject and inferior to the rights of the defendant. And the defendant saith that the St. Joseph & Denver City Railroad Company, until said date last aforesaid, had no corporate existence in the State of Nebraska, and could not and did not acquire any right, title, or interest in or to the above described parcel of land by virtue of the said act of Congress and the construction of its said road in the State of Nebraska; that the said railroad company, by virtue of the said act of Congress and the construction of its road, took only the alternate sections of lands
22 designated by odd numbers for ten sections in width on each side of said road, constructed in the State of Kansas, where said corporation was organized.

III. And the said defendant for a further answer to the said complainant's said bill, saith, that the said St. Joseph & Denver City Railroad Company did not construct and operate its railroad from Elwood, Kansas, westwardly via Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad or any branch thereof, not further west than the one hundredth meridian of west longitude, as required by the terms, conditions, and impositions of said act of Congress, but the said St. Joseph and Denver City Railroad Company only constructed and operated its railroad to a junction with the Burlington & Missouri River Railroad, which was not then and never has been a branch of the Union Pacific Railroad.

IV. And the said defendant, for a further answer to the said complainant's said bill, saith, that on the 4th day of April, A. D. 1870, the said Charles H. Van Wyck purchased the said parcel of land from the United States by private entry thereof, at the land office at Beatrice, Nebraska, where the same was subject to entry and sale, in good faith and without any notice or knowledge of the alleged claim of the said St. Joseph and Denver City Railroad Company or its grantees whatsoever to said land; and that thereafter, on or about the 2nd day of January, A. D. 1871, letters patent of the United States were issued to him, in accordance with the said entry and sale, out of the land department of the government, for said parcel of land, and by the title thereto, so by him acquired, has come to the said defendant Charles H. Van Wyck, who by virtue thereof obtained the said title and became the owner of said lands in fee; that at the time of the said entry and sale of said parcel of land the same was subject to entry and sale at the land office at Beatrice, and had not been withdrawn from the market by the Secretary of the Interior, nor by any authority of the government; that the Secretary of the Interior, through instructions to the register and receiver of the land office at
23 Beatrice, did not withdraw the lands described in the said act of Congress from the market until the 15th day of April, 1870; nor

were the same withdrawn from the market, homestead, or pre-emption entry until said date.

V. And the defendant, for a further answer to the said complainant's said bill, saith that the said certain indenture or mortgage made by the St. Joseph & Denver City Railroad Company, of the first part, to the Farmers' Loan and Trust Company, of the second part, as set forth in the said complainant's bill, does not contain a description of and was not made and executed as an incumbrance upon the said parcel of land hereinbefore described; and the said mortgage was not executed or intended by the Saint Joseph and Denver City Railroad Company, nor was it received or accepted by the said Farmers' Loan and Trust Company as a mortgage upon the said parcel of land: that the said mortgage was not filed or recorded in Thayer County, Nebraska; neither were the other conveyance' under which the complainant claims title to said parcel of land, and the complainant obtained no title or interest in the said parcel of land, the defendant, under and by virtue of the said mortgage, and the said decree, sale, and subsequent conveyances to him and his grantors thereunder.

VI. And the said defendant, for a further answer to the said complainant's said bill, saith that the said Charles H. Van Wyck, who entered and purchased said parcel of land from the United States, as hereinbefore set forth, went into the possession and occupation thereof on or about the said 4th day of April, 1870, and that he, with the subsequent grantees and grantors under him, with the said defendant, have ever since paid all the taxes and assessments against said land, and expended large sums of money in that behalf, and have made valuable and lasting improvements thereon in good faith and upon the belief that they held the title thereto in fee, and have been in the continuous and sole occupation and possession of the said parcel of land; and that the said cause of action set forth in said complainant's said bill did not accrue to the said complainant and the respective grantors from whom he claims title in his said bill against the defendant within ten years next before the commencement of this suit.

24 And the defendant saith that he is ready and willing to maintain and prove as this honorable court shall direct, all matters and things in this his answer set forth, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

And the defendant further humbly prays that in the event this honorable court should grant the prayer of the said complainant in his said bill, and by a decree herein declare that the said patent was issued to and received by the said party hereinbefore referred to, and that he purchased and entered said parcel of land in trust for said company, and not otherwise, and that the title thereunder is now held by the said defendant in trust for the said complainant, and should further decree that said defendant convey the said parcel of land to the said complainant, then that the defendant may demand and recover the value of all lasting and valuable improvements made on said parcel of land, and of all taxes and assessments paid thereon, and that such proceedings may be had in the defendant's behalf as provided by the statutes of Nebraska and the laws in force

for the relief of the defendant as an occupying claimant, and for such other and further relief as the defendant may be entitled to in equity.

CHARLES H. VAN WYCK,
Defendant.

By J. C. WATSON AND
E. F. WARREN AND
BROWN & MARSHALL,
Solicitors for Def't.

STATE OF NEBRASKA,
County of Lancaster, ss:

Charles H. Van Wyck, being first duly sworn, says that he is defendant in the above entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true os his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

Subscribed in my presence and sworn to before me this 5th day of January, A. D., 1881.

25 (Upon the back of said answer appear endorsements in words and figures following:) No. 218 E. U. S. circuit court, district of Nebraska. Sherman W. Knevals vs. Charles H. Van Wyck. Answer. J. C. Watson and E. F. Warren and Brown & Marshall, solicitors for defendant. Filed Jan. 5, 1881. Watson B. Smith, clerk.

On the 15th day of January, 1881, said plaintiff filed his replication to said answer, as follows:

In the circuit court of the United States in and for the district of Nebraska. In equity.

SHERMAN W. KNEVALS
vs.
CHARLES H. VAN WYCK. } No. 218 E.

The replication of Sherman W. Knevals, plaintiff, to the answer of Charles H. Van Wyck, defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit of advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by his said bill of complaint he has already prayed.

JAMES M. WOOLWORTH,
Solicitor for Plaintiff.

26 (Said replication is endorsed as follows:) No. 218 E. U. S. circuit court, district of Nebraska. In equity. Sherman W. Knevals vs. Chas. H. Van Wyck. Replication. Filed Jan'y 15, 1881. Watson B. Smith, clerk. James M. Woolworth, solicitor for plaintiff.

On the 17th day of November, A. D. 1881, the parties to said bill, by their respective counsel, filed an agreed statement of facts, as follows:

Agreed statement of facts.

In the circuit court of the United States, district of Nebraska.

SHERMAN W. KNEVALS }
vs.
CHARLES H. VAN WYCK. }

It is hereby agreed between the parties hereto that the facts in this case are as follows:

First. The act a copy of which is hereto annexed, marked "A" was on the 17th day of February, 1857, duly passed by the legislative assembly of the Territory of Kansas, and approved by the governor thereof.

The act, a copy of which is hereto annexed, marked "B" was on the 6th day of March, 1862, passed by the legislature and approved by the governor of the State of Kansas.

On the 17th day of April, 1862, a meeting of the stockholders of said company, duly called and convened, was held at Elwood, in the State of Kansas, at which the proceedings were had set out in a copy of the records of said company, which is hereto annexed, marked "C."

At a meeting of the board of directors of said company, held at Elwood on the 12th day of May, 1862, proceedings of said board were had, as the same appears by the record thereof, a copy of which is hereto annexed, marked "D."

On the 9th day of October, 1866, at a meeting of the board of directors of said company a resolution was passed, a copy of which is hereto annexed, marked "E."

27 On the 3rd of February, 1870, at a meeting of the board of directors of said company, a resolution was passed, a copy of which is hereto annexed, marked "F";

On the 11th of December the paper, a copy of which is hereto annexed, marked "G," was filed in the office of the Secretary of the Interior.

Second. On the 23rd day of July, 1866, Congress passed an act a copy of which is annexed to the bill in this case.

Third. The engineers of said railroad company having made a topographical map of the country through which said company proposed to build said line of road, showing the government surveys and the proposed route of the road with reference to the section lines and the towns, counties, and rivers, which map was on the 21st of March, 1870, approved by the board of directors of said company, and on the 25th of March, 1870, said map, with the certificates endorsed thereon showing the aforesaid action of the directors of the said company, was filed with the Secretary of the Interior, who accepted it, and on the 28th of said month

transmitted it to the Commissioner of the General Land Office, with a letter, a copy of which is hereto annexed, marked "H."

Fourth. On the 8th day of April, 1870, the said Commissioner transmitted a copy of said map to the register and receiver of the land office at Beatrice, a copy of which letter is hereto annexed, marked "I," but which was not received at said Beatrice government land office until the 15th day of April, 1870. That on receipt of said map at the land office the lands supposed to be covered by said grant to the railroad company were by said register and receiver withdrawn from market, and not before.

Fifth. That said company built and completed sections of said road from time to time until July 15th, 1872, when the same was completed to Hastings, where it made a junction with the Burlington and Missouri River Railroad in Nebraska, but that said road has never been completed to any point on the Union Pacific nor any branch thereof, unless it shall be held and construed that the Burlington and Missouri River
28 Railroad in Nebraska is a branch of the Union Pacific. The road so built was, for some distance, substantially upon the line delineated on said map, and ran through Thayer and Nuckolls counties, in Nebraska, and which were within the district of lands subject to sale at Beatrice aforesaid. But at a point about one mile east of the lands in question in this suit, and about seventy-five miles east of Hastings, the road as constructed departed from the proposed line, as shown by the map, and the road as built was distant from the proposed line at the point opposite these lands in controversy from forty to sixty rods, and from said last-mentioned point west the line of the road as built deviates from the proposed line, as shown by said map, from one to three miles for the balance of the road. Each section of ten miles of said road was built and completed within the time limited by said act of Congress save only the first sixty miles from Elwood, and the whole road to the junction with the Burlington and Missouri River Railroad was completed within ten years from the date of said act, a copy of which is annexed to said bill. The road through Thayer and Nuckolls counties is more than one hundred miles west of Elwood.

Sixth. As each consecutive section of said road was completed the governor of Kansas made the certificate required by said act in that behalf and filed the same with the Secretary of the Interior. The plaintiff by the deeds and proceedings mentioned in said bill now has and at the beginning of this suit had all the title which the railroad company acquired to the lands in controversy by virtue of said grant and the matters aforesaid. That said lands are within ten miles of the said railroad as built, and also of the line of the route thereof delineated on said map, and when the map above mentioned was filed with the Secretary of the Interior no right or pre-emption or homestead had attached thereto, nor had the same been reserved by the United States for any purpose whatever, and patents for most of the lands claimed by the plaintiff to have been granted by said act were issued to said company in due course of business in the land department.

29 Seventh. On the 13th of April, 1870, the defendant entered said lands at private entry at the land office at Beatrice, and paid therefor one dollar and a quarter per acre, and on the 15th of November, 1871,

a patent issued to him therefor. An application was made to the land department of the government by said railroad company for the patent to said lands with tender of the necessary fees and charges, but it was refused.

Eighth. On the 1st day of April, 1873, and not before, the said railroad company filed in the office of the secretary of state of Nebraska a paper which contained the exhibits heretofore referred to and hereto attached, marked A, B, C, D, and F, but did not before said last-mentioned date file its articles or incorporation in the office of the secretary of state of the State of Nebraska, or otherwise attempt to comply with the laws of that State in respect of foreign railroad corporations extending their roads into that State. That the value of the lands the title to which is in controversy in this suit exceeds the sum of five thousand dollars.

J. M. WOOLWORTH,
Sol. for Pl'ff and of Counsel.
J. C. WATSON,
Att'y for Def't.
E. E. BROWN, *Of Counsel.*

Attached to said agreed statement of facts are exhibits A, B, C, D, E, F, G, H, and I, which are as follows:

EXHIBIT A.

An act to incorporate the Marysville or Palmetto and Roseport Railroad Company.

Be it enacted by the governor and legislative assembly of the Territory of Kansas, as follows:

SECTION 1. A company is hereby incorporated called the Marysville or Palmetto and Roseport Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal, and shall be able in law and in equity to make contracts; may take, hold, use, possess, and enjoy the fee-simple or other title in and to any real estate, and may sell and dispose of the same; may make by-laws, rules, and regulations proper for carrying into effect the provisions of this act not repugnant to the Constitution or laws of the United States or of this Territory, and shall have the usual and necessary powers of companies for such purposes.

SEC. 2. Robert M. Stewart, W. P. Richardson, F. J. Marshall, Richard Rose, Bela M. Hughes, John W. Foreman, Willard P. Hall, A. M. Mitchell, Reuben Middleton, R. H. Jenkins, Fred W. Smith, Geo. S. Hall, and W. S. Brewster shall constitute the first board of directors under this act, and shall hold their offices until their successors shall be qualified. They shall meet at such times as shall be designated by a majority of them, and organize as a board of directors, and when organized they shall cause books to be opened for subscription to the capital stock of said company at such times and places as they or any five of them may designate under the supervision of such person or persons as they may appoint, and may continu-

them open so long as they may deem proper, and may reopen such books, when necessary, until the whole stock shall be subscribed.

SEC. 3. So soon as five hundred shares shall be subscribed, the directors shall cause an election to be held for not less than five nor more than nine directors at such time and place as they may appoint, and give notice by publication in three newspapers published in this Territory.

SEC. 4. An election for directors shall be held on the second Tuesday of October in each year, and if not held on that day an election may be held at any other time that the directors may designate. The election shall be under the supervision of one or more stockholders, and the person receiving the highest number of votes shall be elected, and shall
31 continue in office till their successors be qualified. Every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy. Soon after their election the directors shall meet and elect one of their number president, who shall hold his office for the term for which he was elected director and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company; shall keep a journal of their proceedings, and cause correct books and accounts to be kept; they may determine by by-laws what number of directors shall constitute a quorum, and may appoint committees, and fill all vacancies in any office under said company; they shall fix the salaries of the president and officers and agents, but no director shall receive any compensation for his services as such; they may take security from their officers and agents, and may adopt such measures and do such acts as may be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper; and if any stockholder shall fail to pay such requisition within ten days after the appointed time, the said company may declare the stock forfeited and sell the same, and no delinquent stockholder shall vote in said company.

SEC. 7. The company shall have full power to survey, mark, locate, and construct a railroad from Marysville or Palmetto City to Roseport, in the Territory of Kansas, so as to connect with the Hannibal & St. Joseph Railroad, and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may also hold sufficient land for the construction of depots, warehouses, and water stations, and may select such route within the valley or ravine, and may extend branch roads to any points in any counties in which said road may be located.

SEC. 8. Said company may take voluntary relinquishments of
32 the *of the* right of way of said road and the necessary water stations and depots; and if the land through which said road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purposes aforesaid on fair and equitable terms; but every such conveyance by a guardian shall be subject to the approval or rejection of the probate or county court in which such guardianship is pending.

SEC. 9. Any company shall have power by themselves or agents to enter

and take from any lands in the neighborhood of the line of their railroad earth, gravel, stone, wood, water, or other material necessary for the construction of said road; also for the purpose of depositing thereon earth, stone, gravel, coal, wood, &c., and for the purpose of procuring water for their uses may lay pipes, erect pumps, dams, and reservoirs, and maintain and keep the same in repair, paying, if the owners of said land and the said company can agree, the damages they shall do to the said lands or its appurtenances; and if the parties cannot agree the damages will be decided and paid for as hereinafter provided.

SEC. 10. If any owner of any tract of land through which said railroad shall pass shall refuse to relinquish the right of way for said road for said company, or if the persons be infants or persons of unsound mind, or non-residents of the Territory, the facts of the case shall be specifically stated to the judge of the district or probate court of the county in which such lands or materials are situated, and said judge shall appoint three disinterested citizens of the county to view said lands and materials, who shall take into consideration the value of the land, earth, gravel, stone, wood, or other material necessary for the construction of said road, and the advantages and disadvantages of the road to the same, and shall report under oath what damages will be done to said lands or any improvement thereon, stating the amount of the damages assessed, and shall return a plat
33 of the land thus condemned; notice of such application to such judge shall be given to the owner of said land and materials five days before the making of the application if such owner reside in this Territory, or to his guardian; and if such owner be a non-resident of this Territory he may be served with actual notice or by an advertisement for four weeks in some newspaper.

SEC. 11. The persons appointed to view and value such lands and materials shall file their report and plat in the office of the clerk of the district or probate court in which the land, or part thereof, is situated; and if no valid objections be made to said report the court shall enter judgment against said company for the amount of damages so assessed, and shall make an order vesting in said company the fee-simple title of the land in such plat and report described. Objections to such report must be filed within ten days after the same shall be filed, which objections shall be examined by said judge in term time or vacation; and he may hear testimony and by judgment confirm said report, or may set the same aside, and appoint three other viewers, who shall proceed in the same manner and make their report until a report shall be confirmed. In all such cases the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and materials and the said company.

SEC. 12. Said company may build said road along or across and territorial or county road, or the streets or wharves of any town or city, and over any stream or highway; but whenever said railroad shall cross any territorial or county road said company shall keep good and sufficient causeways or other adequate facilities for crossing the same; and said railroad shall not be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass; and when said railroad shall be built across any navigable stream said company shall erect a bridge sufficiently high on which to cross, or shall construct a draw-

bridge, so that in no case shall the free navigation of such stream be obstructed.

SEC. 13. Said company shall commence the construction of said road within seven years, and shall complete the same within ten years
34 thereafter; and said company shall have general power to use, manage, control, and enjoy said railroad; shall determine what kind of carriages shall be used thereon, and by whom and in what manner; and shall determine the terms, conditions, and manner in which merchandise, property, and passengers shall be transported thereon; and shall have power to construct and keep such turnouts, gates, bridges, culverts, tollhouses, depots, and warehouses, causeways, and other buildings, machinery, and fixtures, as may be necessary.

SEC. 14. Dividends of the profits of said company shall be made annually, or oftener if necessary; but the directors may reserve or set apart a portion of the profits as a contingent fund to meet expenditures and losses.

SEC. 15. At any annual meeting of said company the directors shall make to the stockholders an exhibit of the affairs and condition of the company; one-seventh part of the interest of all the stockholders may call a meeting by giving four weeks' notice in one newspaper printed in the Territory.

SEC. 16. When said road shall be completed the company shall file a plat thereof in the office of the secretary of the Territory or State, as the case may be, and the legislature may at any time require a statement from the company as to the progress of work, the amount of business, and the receipts of the company, and the books and accounts may at any time be investigated by a committee appointed by the legislative assembly.

SEC. 17. When any person shall cease to be a stockholder he shall cease to be a member of the company.

SEC. 18. If any person shall willfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixture or improvement belonging to said company, he shall be considered guilty of a criminal offence, and shall be punished in such manner as shall be prescribed by law, and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the
35 general business of locating, constructing, managing, and using said road, and the acts necessary or proper to carry the same into complete and successful operation, and for such purposes, and no other. Said company shall have power to extend their capital, receive loans, grants, and donations of land, money, or bonds, in any quantity, from this Territory, or from the United States; and may sell, convey, pledge, mortgage, or otherwise dispose of said lands, or any part thereof, and apply the proceeds to the construction of said road and branches for the benefit of said company.

SEC. 20. That so much of the provisions of section thirteen of article first of an act entitled "An act concerning corporations" as relates to stocks owned by incorporate companies shall not apply to this act. This act to take *and* effect and be in force from and after its passage.

Approved.

EXHIBIT B.

Chapter clxx. (Session 1862.) An act relating to railroad companies.

Be it enacted by the legislature of the State of Kansas:

1. Any railroad company now organized, or which shall hereafter organize, under the laws of Kansas may, at any meeting regularly called of all the stockholders thereof, by vote of persons holding a majority of the stock of such company unite or consolidate it with any other company or companies now organized, or which may be hereafter organized, under the laws of the United States, or of any State or Territory, by the consent of the company with which it may so consolidate and unite, and such company or companies with which it shall so unite or consolidate may hold, use, and enjoy all the rights and privileges conferred by the laws of Kansas on the company or companies uniting or consolidating with it, and shall be liable for all the debts and own all the property and franchises of such company or companies; provided, that any companies thus united
for the purpose of construction of a railroad and branches thereof
36 from the western boundary of the State of Missouri to Pacific
Ocean shall, upon equal terms, have the right to run through cars upon said Pacific Railroad as far and as fast as the same is completed from the points on the Missouri River from which said road or branches shall start, or where such road or branches shall cross said river; and that such roads or branches shall have the right to connect with said Pacific Railroad at such points as may be determined by the respective roads or branches, and that such roads or branches shall share equally in the proceeds of any public lands which may be hereafter ceeded or granted by any treaty with any Indian tribe or by any act of Congress to aid in the construction of any or all such roads; but this amendment shall not apply to the lands already by treaty ceeded by the Potawatomie Indians by treaty now pending in the United States Senate, such proceeds to be applied in proportion to the length of the line of each road from the respective points on the Missouri River where such roads shall start or cross the same to the points of connection; and that such branches shall have the right to transport passengers and freight upon through cars, or otherwise, upon equal terms, and to enjoy equal facilities in respect to contracts for freight or passage on such Pacific Railroad in every respect.

SEC. 2. Any railroad company now organized, or which may hereafter organize, under the laws of the State or Territory of Kansas shall have the right to construct and operate along its proposed route a line of telegraph as soon as the work of construction of such road shall have been commenced, with all the rights, privileges, and franchises given to any telegraph company under any law of the State or Territory of Kansas.

SEC. 3. Any such railroad company by vote of persons owning a majority of its stock at any meeting regularly called of all the stockholders of such company may change its corporate name or the number of its directors at pleasure, and may in like manner make valid and effectual any acts done in good faith, and may cause to be done any acts omitted affecting the organization or affairs of said company or the continuance of its
charter, though such acts may have been done or omitted contrary to
37 the regulations of such company or the requirements of law; pro-

vided, the time given by law to such railroad company within which to commence the construction of its road shall not be hereby extended.

SEC. 4. Any railroad company now organized under the laws of the State or Territory of Kansas may extend their road and construct the same still further in the same general direction under the same restrictions now embodied in their charters, and may increase their capital at the rate of $15,000 per mile for every mile so constructed.

SEC. 5. Any railroad company now organized under the laws of the State or Territory of Kansas may receive subscriptions to the capital stock of their roads in lands, lots, houses, or any personal property at such valuation as may be agreed upon with the party or parties; and the company may sell, mortgage, or pledge such real or personal property to raise money or material for constructing, equip'ing, or operating said road.

SEC. 6. For the purpose of enabling any company to construct, equip, and operate their road they are hereby authorized to pledge or mortgage said road, rolling-stock, machinery, depots, and any other property they possess, together with the franchise of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road.

SEC. 7. All deeds for the conveyance of real estate of said company shall be signed by the president of said company and attested by the secretary with the corporate seal attached, which shall be deemed and held a sufficient execution, authentication, and acknowledgment of such deeds in all courts.

SEC. 8. This act shall take effect and be in force from and after its publication; and the secretary of state is directed to cause it to be published immediately after its passage.

38 EXHIBIT C.

ELWOOD, *April 17th*, 1862.

Pursuant to notice a meeting of the stockholders of the Marysville or Palmetto and Roseport Railroad Company was held at the Great Western Hotel on Thursday the 17th day of April, 1862. The meeting was called to order and Frederick W. Smith was appointed chairman of the meeting.

On motion John Corby was elected secretary.

The following-named persons received the number of votes opposite their respective names:

St. Joseph...	Thomas Harbine	1,004 votes.
	John Corby	1,004 "
	Willard P. Hall	1,004 "
	William Pridenbaugh	1,004 "
	William K. Richardson	1,004 "
	William Fowler	1,004 "
Elwood.....	E. Blackiston	1,004 "
	G. S. Hough	1,004 "
	A. L. Lee	1,004 "

And each of the above-named gentlemen having received a majority of the votes polled at said election they were declared duly elected directors of said company for the ensuing year.

Pursuant to notice the stockholders of said Marysvill' or Palmetto and Roseport Railroad Company were required to give their assent or dissent on the propriety of changing the name of said corporation to that of the St. Joseph and Denver City Railroad Company, and upon counting the vote present there appeared in favor of the change in the name or title of said Marysville or Palmetto and Roseport Railroad Company one thousand four votes, the same being a majority of the shares of stock owned in said company. Against said change of name there was no dissent.

(Sig.) JOHN CORBY,
Secretary.

39 EXHIBIT D.

ELWOOD, *May 12th*, 1862.

A meeting of the directors of the Marysville or Palmetto and Roseport Railroad Company, elected at a meeting of the stockholders of said railroad company on the 17th of April, 1862, convened at the Great Western Hotel in the city of Elwood, State of Kansas, on the 12th day of May, 1862. There was present Thomas Harbine, John Corby, W. K. Richardson, Wm. Ridenbaugh, E. Blackinston, and G. S. Hough; which being a majority of the board elect, proceeded to the transaction of business. On motion, W. K. Richardson was appointed chairman and John Corby, secretary. An election for president was entered into, and Thos. Harbine was unanimously elected as president. John Corby was unanimously elected secretary. Mr. Ridenbough offered the following resolution:

Whereas the stockholders of the Marysville or Palmetto and Roseport Railroad Company, at a regularly called meeting of all the stockholders, met at the Great Western Hotel, in the city of Elwood, State of Kansas, on Thursday the 17th of April, 1862, among other proceedings unanimously voted to change the name of the said Marysville or Palmetto and Roseport Railroad Company to that of the Saint Joseph and Denver City Railroad Company; and whereas the authority to make such change of title was vested in said stockholders by virtue of the third section of an act of legislature of the State of Kansas entitled "An act relating to railroad companies," and approved March 5th, 1862, where said third section is in the following words: "Any such railroad company by vote of persons owning a majority of its stock, at any meeting regularly called of all the stockholders of such company, may change its corporate name or the number of its directors at pleasure, and may in like manner make valid and effectual any act done in good faith, and may cause any acts omitted effecting its organization or affairs of such company or the continuance of its charter, though such acts may have been done or omitted contrary to the regulation of such company or requirements of law, provided the time given by law to such railroad company within which to commence the construction of its road shall not be extended:"

40 Therefore be it resolved, that the name and style of said company be, and shall hereafter be, known by that of the St. Joseph and Denver City Railroad Company, and that all contracts or obligations made by said Marysville or Palmetto and Roseport Railroad Company shall

be, and the same are hereby, recognized as valid and binding upon the St. Joseph and Denver City Railroad Company.

Which was unanimously adopted.

(Sign') JOHN CORBY,
Secretary.

EXHIBIT E.

Whereas the 39th Congress of the United States passed an act granting to the State of Kansas for the use and benefit of the St. Joseph and Denver City Railroad Company every alternate section of land designated by odd numbers for ten sections in width on each side of each road to the point of intersection with the Union Pacific Railroad or any branch thereof, which act is in the words and figures following, to wit:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there is hereby granted to the State of Kansas for the use and benefit of the St. Joseph and Denver Railroad Company, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly, via Marysvill', in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers for ten sections in width on each side of said road to the point of intersection.

But in case it shall appear that the United States have when the line of the route of said road is definitely fixed sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the
41 purposes aforesaid from the public lands of the United States nearest to tiers of sections above specified so much lands in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid shall be held by the State of Kansas for the use and purpose aforesaid; provided further, that the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided; provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of land or bonds have been made by Congress; and provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the route of said road through said lands, in which case the right of way for one hun-

dred feet on each side of said railroad only shall be granted, subject to the approval of the President of the United States.

SECTION 2. And be it further enacted, that the sections and parts of secti'ns of land which by said grant shall remain to the United States within ten miles of each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder or above the increased minimum price as aforesaid; provided, that actual and bona-fide settlers under the provisions of the pre-emption and homestead laws
42 of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid; and provided also, that settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy, and cultivate the same for a period of five years and comply with the several conditions and requirements of said act shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, that the grant of lands h'reby made is upon condition that the said company after the construction of its road shall keep it in repair and in use, and shall at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the government when required to do so by any department thereof, the government at all times having the preference in the use of the road for all the purposes aforesaid at fair and reasonable rates of compensation, not exceeding that paid by private individuals or the average paid for like service on other roads. And the lands hereby granted, held, and reserved as aforesaid shall inure to the benefit of the said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and co-te'minus with the said completed sections, and when certificates of the governor aforesaid shall be presented to said Secretary of the completion as aforesaid of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of said land as aforesaid for each of said sections of road until said road shall be completed; provided, that if said railroad company or its assigns shall fail to complete at least one section of said
43 road each year from the date of its acceptance of the *the* grant provided for in this act, then its right to the lands for said section so failing of completion shall revert to the Government of the United States; provided further, that if said road is not completed within ten years from the date of the acceptance of the grant hereinafter made, the lands remaining unpatented shall revert to the United States.

SEC. 4. And be it further enacted, that as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purpose of this act and subserve the public interest.

SEC. 5. And be it further enacted, that the United States mail shall be transported on said road and its extension under the direction of the Post-Office Department, at such price as Congress may by law provide; provided, that until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

SEC. 6. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations.

SEC. 7. And be it further enacted, that the acceptance of the terms, conditions, and impositions of this act by the said St. Joseph and Denver City Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made
44 within six months after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

Approved July 23, 1866.

Therefore, resolved by the president and directors of the St. Joseph and Denver City Railroad Company, at a meeting held in Elwood, Doniphan County, Kansas, on the 9th day of October, 1866, of the directors of said company, that we do hereby accept the terms, conditions, and impositions of said act of Congress entitled "An act *f*for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," approved July 23, 1866, and that the president and secretary of said company cause to be filed with the Secretary of the Interior, under the seal of said corporation, a certified copy of this resolution and of the proceedings of said corporation accepting the terms, conditions, and impositions contained in said act.

EXHIBIT F.

Whereas the legislature of Kansas did heretofore pass an act entitled "An act to incorporate the Marysville or Palmetto and Roseport Railroad Company," which said act was approved February 17th, 1857, and whereas afterwards, to wit, on the 12th day of May, 1862, the name of the Marysville or Palmetto and Roseport Railroad Company was changed to that of the Saint Joseph and Denver City Railroad Company, in accordance with the provisions of an act of the Kansas legislature entitled "An act relating to railroad companies," approved March 5th, 1862; and whereas the said St. Joseph and Denver City Railroad Company is desirous of extending its railroad from said town *of* city of Marysville into the State of Nebraska so as to make a connection with the Union Pacific Railroad at or near Kearney, in the State of Nebraska, and to that end wishes to avail itself of the provisions of an act of said State of Nebraska entitled "An act to authorize non-resident railroad companies to build roads in Nebraska," approved February 12th, 1869; and whereas

the said St. Joseph and Denver City Railroad Company were at
45 the date of the passage of said last-recited act, and long prior thereto, a railroad company organized under the the laws of the State of Kansas:

Therefore be it resolved, that the president of this company be, and he hereby is, authorized and directed to proceed without delay and file a true copy of the articles of incorporation of this company with the secretary of state of Nebraska, and to do and perform for this company all other acts and things and to file all other papers in the proper offices in the State of Nebraska necessary to secure to this company all the rights and privileges and provisions of said act of said State of Nebraska.

Resolved, that this company will keep an office at Jenkin's Mills, in the county of Jefferson, in the State of Nebraska, till otherwise ordered, said county being a county in which it is proposed that the railroad of the company shall be in pursuance of the provisions of said act of said State of Nebraska.

Resolved, that the railroad of this company shall pass through and into the following counties in the said State of Nebraska, to wit: Jefferson, Fillmore, Nuckolls, Clay, Adams, and Kearney.

Exhibit G.

Acceptance of the terms, conditions, and impositions of an act of the 39th Congress entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph."

Whereas by an act of the 39th Congress entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," approved July 23rd, 1866, there was granted to the State of Kansas for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly via Marysville in the
46 same State, so as to effect a junction with the Union Pacific Railroad or any branch thereof, ten sections of land on each side of said road to the point of intersection; and whereas on the 9th day of October, A. D. 1866, the following proceedings was adopted at a meeting of the directors of said road:

"Whereas the 39th Congress of the United States passed an act granting to the State of Kansas for the use and benefit of the St Joseph and Denver City Railroad Company every alternate section of lands designated by odd numbers for ten sections in width on each side of said road to the point of intersection with the Union Pacific Railroad or any branch thereof, which act is in the words and figures following, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the *the* laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly via Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any

branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers for ten sections in width on each side of said road to the point of intersection. But in case it shall appear that the United States have, when the line of the route of the said road is definitely fixed, sold any section or part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of
47 pre-emption or homestead settlements have attached as aforesaid, which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid shall be held by the State of Kansas for the use and purpose aforesaid; provided, that the lands to be so selected shall in no case be located further than twenty miles from the line of said road; provided further, that the lands hereby granted for and on account of said road shall be exclusively applied to the construction of the same and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided; provided, also, that no part of the lands granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds have been made by Congress; and provided further, that any and all lands heretofore reserved by the United States by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said road through said lands, in which case the right of way of one hundred feet on each side of said road only shall be granted, subject to the approval of the President of the United States.

"SECTION 2. And be it further enacted, that the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the increased minimum price as aforesaid; provided, that actual and bona fide settlers under the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid; and provided also, that settlers on any of said
48 reserved sections under the provisions of the homestead law who improve, occupy, and cultivate the same for a period of five years and comply with the several conditions and requirements of said act shall be entitled to a patent for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

"SECTION 3. And be it further enacted, that the grant of lands hereby

made is upon condition that the said company after the construction of its road shall keep it in repair and use and shall at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the government when required to do so by any department thereof, the government at all times having the preference in the use of the road for all the purposes aforesaid at fair and reasonable rates of compensation, not exceeding that paid by private individuals for like service on other roads. And the lands hereby granted, held, and reserved as aforesaid shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in good, substantial, and workmanlike manner as a first class railroad, then the Secretary of the Interior shall issue to the said company patents for so many sections of said land hereinbefore granted as lie opposite to and coterminous with the said completed sections, and when certificates of the governor aforesaid shall be presented to the Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road the said Secretary shall in like manner issue to said company patents for the said sections of said lands as aforesaid for each of said sections of road until said road shall be completed; provided, that if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right for the lands for said section so failing of completion shall revert to the Government of the United States; provided further, that if said road is not completed within ten
49 years from the date of the acceptance of the grant hereinafter made the lands remaining unpatented shall revert to the United States.

"SECTION 4. And be it further enacted, that as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"SECTION 5. And be it further enacted, that the United States mail shall be transported on said road and its extension under the direction of the Post-Office Department at such price as Congress may be law provide; provided, that until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

"SECTION 6. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to the said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water stations.

"SECTION 7. And be it further enacted, that the acceptance of the terms, conditions, and impositions of this act by the St. Joseph and Denver City Railroad Company shall be signified in writing under the corporate seal

of the said company duly executed pursuant to the directions of its board of directors first had and obtained, which acceptance shall be made within six months after the passage of this act and not afterwards, and shall be deposited with the Secretary of the Interior.

"Approved July 23rd, 1866."

50 Therefore resolved by the president and directors of the St. Joseph and Denver City Railroad Company, at a meeting held in Elwood, Doniphan County, Kansas, on the 9th day of October, A. D. 1866, of the directors of said company, that we do hereby accept the terms, conditions, and impositions of said act of Congress, entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," approved July 23, 1866, and that the president and secretary of said company cause to be filed with the Secretary of the Interior, under the seal of said corporation, a certified copy of this resolution and of the proceedings of said corporation accepting the terms, conditions, and impositions contained in said act. Now, therefore, we, Thomas J. Chew, jr., president, and John Corley, secretary, of the St. Joseph and Denver City Railroad Company, do hereby certify that the above and foregoing is a true and correct copy of an act granting certain lands to aid in the construction of said railroad and telegraph and of the proceedings of said St. Joseph and Denver City Railroad Company accepting the terms, conditions, and impositions of said act of Congress.

In testimony whereof we do hereby sign our names as president and secretary of said corporation, and have hereunto attached the seal of the St. Joseph and Denver City Railroad Company, this second day of November, 1866.

[COMPANY'S SEAL.] T. J. CHEW, JR.,
President of the St. Joseph and Denver City Railroad Company.

JOHN CORLEY,
Secretary of the St. Joseph and Denver City Railroad Company.

EXHIBIT H.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 26th, 1870.

SIR: I transmit herewith a map of the definite location of the line of road of the Saint Joseph and Denver City Railroad Company from
50½ Elwood, in Kansas, via Marysville, in said State, to a connection with the Union Pacific Railroad at the southwest corner of section 36, in township 9 north, of range 16 west, in the State of Nebraska.

You will instruct the proper local officers to withhold from sale or other disposal all odd-numbered sections falling within the limits of twenty miles on each side of the line of road.

In thus directing the land to be withdrawn conformably to the 4th section of the act of July 23, 1866, I deem it proper, in order to avoid any misapprehension as to the views of the department, to state that this order is made without prejudice to any existing adverse rights, whether individual or corporate, if such there be, and does not include any lands "heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever."

In case of such reservation to said company there is granted only a right of way for one hundred feet on each side of their line of road, subject to the approval of the President of the United States.

The right of said company to construct their road within the limits of the State of Nebraska may hereafter be the subject of controversy; in that event, nothing contained in this order will preclude the consideration of the question as to such right should it arise in such form as to require the action of the department.

Very respectfully, your ob't servant,

J. D. COX, *Secretary.*

Hon. JOS. S. WILSON,
Com'r of the Gen'l Land Office.

EXHIBIT I.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 8, 1870.

REGISTER & RECEIVER, *Beatrice, Nebraska:*

GENTLEMEN: I herewith transmit to you a map showing the
51 line of definite location of the St. Joseph and Denver City Railroad, and the ten and twenty mile limits of the land grant made thereto under the act of July 23, 1866.

You are hereby directed to withdraw from sale or location, pre-emption, or homestead entry all the odd-numbered sections falling within those limits, and to increase in price to $2.50 per acre all the even-numbered sections within the 10-mile limits, and dispose of the same under the pre-emption and homestead laws only, and at that ratability, except in settlement made prior to this withdrawal, in which case you will permit the parties, in virtue of the act of March 27, 1854, to prove up and pay for their claims upon either odd or even sections at the rate of $1.25 per acre, in accordance with the rules and regulations prescribed by the enclosed circular, dated Feb'y 10, 1870.

The even-numbered sections outside of the ten-mile limits are not affected by this letter.

The instructions herein given will take effect from the date of their receipt at your office, and I have to request that you will acknowledge the same by date.

Very respectfully,

JOS. S. WILSON,
Commisssoner.

LAND OFFICE,
Beatrice, Neb., April 15, 1870.

Hon. JOSEPH S. WILSON,
Com'r Gen'l L. O., Washington, D. C.:

SIR: I have the honor to acknowledge the receipt this day of your letter of April 8, 1870, enclosing a diagram of the route of the St. Joseph and Denver City Railroad, together with the ten and twenty mile limits of the land grant to said road shown thereon, and have to report that the boundaries of each ten and twenty miles limits have been laid down upon

the plats of this office and other necessary steps taken to give full
52 force and effect to your instructions in said letter. I have also to report that the circular dated February 10, 1870, referred to in the above-mentioned letter, was not enclosed as stated, and I would request that this office be furnished with some copies of it.

Very respectfully, &c.,

NATHAN BLAKELY,
Receiver.

(Said agreed statement of facts is endorsed as follows:) No. 218 E. United States circuit court, district of Nebraska. Sherman W. Knevals vs. Charles H. Van Wyck. Agreed statement of facts. Filed Nov. 17, 1881. Watson B. Smith, clerk. By Elmer D. Frank, dep.

On the 11th day of September, 1882, the cause came on to be heard before the honorable Elmer S. Dundy, judge, whereupon he rendered the following decree:

At a circuit court of the United States for the district of Nebraska, held at the federal court-house in the city of Omaha, on the day of June, 1882.

Present, honorable Elmer S. Dundy, judge.

SHERMAN W. KNEVALS
vs. } No. 218 E.
CHARLES H. VAN WYCK.

This cause came on to be heard upon the pleadings and the agreed statement of facts, and thereupon it is ordered, adjudged, and decreed as follows:

1. That on the 25th of March, 1870, the line or route of the St. Joseph and Denver City Railroad Company was definitely fixed, and the grant to the State of Kansas to aid in the construction of its railroad by the act of Congress entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas Railroad and
53 Telegraph," approved July 23d, 1866, became located and operative, so that upon the construction of its road in manner prescribed in said act, and notice of the facts to the Secretary of the Interior as therein required, the said railroad company became and was entitled to a patent for the lands hereinafter described; that the said company built said railroad within the time and in the manner in the said act required, and the said Secretary was informed thereof as therein provided, and the patent of said lands was made and issued out of the land department of the government and by the proper officers thereof to the party in that behalf in the bill referred to; that he received the same and the title thereby conveyed in trust for said company and not otherwise, and at the commencement of this suit the said defendant held the same upon the like trust for the said plaintiff.

2. That the said defendant make, execute, and deliver said deed to said plaintiff *his deed* in due form of law and acknowledged so as to be entitled to record in the registry of Thayer County, conveying the said prem-

ises to him, the said plaintiff, with covenants or warranty against all acts done, suffered, or committed by the said defendant since the conveyance thereof to him, and that the said defendant make and deliver said deed to said plaintiff within three months from the date of this decree; and in default of his so doing that Elmer S. Dundy, jr., who is hereby for the purpose appointed master of this court, make such deed in his stead and behalf of said defendant, which deed so made by said master shall have the same force and effect as if made by said defendant under and in pursuance of this decree.

3. That upon the production of said deed to the said defendant, and any and all persons holding under him since the commencement of this suit, the said defendant and all said persons let the said plaintiff and any and all his grantees into possession of said premises, and every part thereof, and thereafter do not molest or disturb the possession of said plaintiff or his grantees.

4. The right of the said defendant to any relief on account of
54 his improvements of said premises, or on account of any taxes paid thereon, secured to him by any laws of the State of Nebraska, is hereby reserved, and may be asserted by him, notwithstanding this decree, in such manner and within such time as in said acts may be provided.

5. The said defendant shall pay the costs of this suit, to be taxed by the clerk, and execution may issue therefor.

6. The lands and premises in the said bill and hereinbefore referred to and to be conveyed and surrendered by said defendant are known and described as follows:

All of section seven (7) township four (4) range three (3), and all of section one (1) township four (4) range four (4), in the county of Thayer, Nebraska.

Thereupon said defendant prayed an appeal to the Supreme Court, which is granted, and his bond on appeal fixed at

ELMER S. DUNDY, *Judge.*

Bond for costs $250.

ELMER S. DUNDY, *Judge.*

(Upon the back of the said decree appear the following endorsements:)
218 E. U. S. circuit court, district of Nebraska. Sherman W. Knevals vs. Charles H. Van Wyck. Decree.

On the 5th day of October, A. D. 1882, said defendant filed in said court a bond, of which the following is a copy:

55 Supreme Court of the United States, October term, 1882.

Whereas lately, at a term of the circuit court held at Omaha, in the district of Nebraska, in a suit depending in said court between Sherman W. Knevals ag't Charles H. Van Wyck, a decree was rendered against the said Charles H. Van Wyck; and the said Charles H. Van Wyck having obtained leave to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now we, Paul Schminke, of Nebraska City, in the county of Otoe and State of Nebraska, and John W. Pearman, of Nebraska City, in the county of Otoe and State of Nebraska, undertake and bind ourselves to pay or cause to be paid to James H. McKenney, clerk of the Supreme Court of the United States, or his successors in office, all fees that shall accrue to him, the said clerk, and be charged to said Charles H. Van Wyck in the prosecution of said . .

Witness our hands and seals this 23rd day of Sept., A. D. 1882.

PAUL SCHMINKE. [SEAL.]
JOHN W. PEARMAN. [SEAL.]

Signed and sealed in presence of—
J. C. WATSON.

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for any costs that might accrue in said case.

[SEAL.] ELMER D. FRANK, *Clerk*,
By A. L. FRANK, *Deputy*.

I am satisfied with this bond as to form and sufficiency of sureties.
J. M. WOOLWORTH,
Att'y for Appellee.

OCT. 5, 1882.

56 (On the back of said bond appear the endorsements as follows:) Sherman W. Knevals vs. Charles H. Van Wyck. Bond. Filed Oct. 5, 1882. Elmer D. Frank, clerk. By A. L. Frank, deputy.

57 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, certify that the foregoing folios, from 1 to 56, contain true and faithful transcripts of the pleadings, agreed statement of facts, decree, and appeal bond, of record and on file in my office as said clerk, in case of Sherman W. Knevals vs. Charles H. Van Wyck.

Witness my hand and the seal of said circuit court, at Omaha, this 6th of October, A. D. 1882.

[SEAL.] ELMER D. FRANK, *Clerk*.
By A. L. FRANK, *Deputy*.

(Indorsement on cover:) No. 1033. Charles H. Van Wyck, appellant, vs. Sherman W. Knevals. Nebrasca c. c. U. S. Filed 10th October, 1882.

16-360

OFFICE SUPREME COURT U.S.
FILED
OCT 28 1882

IN THE SUPREME COURT

OF THE

UNITED STATES.

SHERMAN W. KNEVALS,

vs.

CHARLES H. VAN WYCK.

BRIEF OF DEFENDANT.

J. C. WATSON,
Attorney for Defendant.
E. E. BROWN,
Of Counsel.

Tribune Printing Co., Lincoln, Neb.

In the Supreme Court of the United States.

SHERMAN W. KNEVALS
vs.
CHARLES H. VAN WYCK.

The complainant in this case asks the court to set aside and cancel a patent issued by the United States to the defendant for the lands described in the bill, or to decree that the defendant holds the lands in trust for the complainant.

On the 23d day of July, 1866, Congress passed an act making a grant to the State of Kansas in trust for the use and benefit of the St. Joseph and Denver City Railroad Company, a copy of which act is attached to the bill as an exhibit.

The company filed what purported to be a map of its road with the Secretary of the Interior on the 25th day of March, 1870.

On the 13th day of April, 1870, and not before, a copy of the map filed by the company with the Secretary of the Interior was filed in the government land office, in Beatrice, Nebraska, the land office of the land district in which the lands in question were situated; and on that day the odd-numbered sections along the line of the proposed road, for ten sections in width on each side of the road, were, by order of the Secretary of the Interior, withdrawn from market.

Between the 25th of March and the 13th of April, 1870, that is, from the time the map was filed with the Secretary of the Interior until a copy of the map was filed in the government land office at Beatrice and the lands along the line of the proposed road were withdrawn from market—a period of about eighteen days—lands were entered at the local government land office, which it is now claimed are covered by this grant, to an amount of about eighteen thousand acres; and among these are the lands in controversy in this case.

The lands in controversy are in Thayer county, Nebraska, and it appears from the statement of facts that the railroad runs through the counties of Jefferson, Thayer, Nuckolls and Adams, in the State of Nebraska.

A patent was issued by the government, conveying to the defendant these lands, nearly or quite ten years ago, the defendant paying therefor $1.25 per acre. If the plaintiff has any interest in these lands he derives his title from the railroad company, and the railroad obtains its title by virtue of the act of Congress already referred to.

The first question that will claim our attention is: When did this grant take effect so as to attach to any particular sections or tracts of land? The language of the act making the grant is as follows:

"That there is hereby granted to the State of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, via Marysville, in the same State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers as shall be equal

to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands thus indicated by odd numbers and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the State of Kansas for the use and purposes aforesaid."

The only other provision in the act which throws any light on this subject is section four, which is as follows:

"That as soon as the Company shall file with the Secretary of the Interior maps of its lines designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

It is insisted by the complainant that the grant attached to the particular sections and tracts of land covered by it when the company filed a copy of its map, designating the proposed route of its road, with the Secretary of the Interior, while it is claimed, on the part of the defendant, that the grant did not attach to any particular tract or piece of land, but remained afloat until the line of road was definitely fixed and the lands claimed to be covered by it were withdrawn from market.

It is hardly necessary to say that in construing a statute when the wording is sufficiently ambiguous to permit construction, it is the first duty of the court to ascertain the intention of the legislature which framed the statute, the object sought to be accomplished, the mode and manner in which the object is to be carried into effect, the situation of the parties interested, and all the surroundings which may throw any light on the ambiguous words employed by such legislative body whereby its intention may be discovered.

When, under this grant did the title to any particular lands pass from the government and vest in the State of Kansas for the use and benefit of the Railroad Company?

This court has held this to be a grant *in presenti*, subject to the condition that—

"If at that time the line of the road was definitely fixed, the United States had sold any section, or any part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated in lieu of those appropriated, which should be held by the State for the same purposes. The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. The object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress therefore adopted the policy of keeping the public lands open to occupation and pre-emption and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired."

Railroad Co. vs. Baldwin, 103 U. S., 426.

What we deem of particular importance in this decision is where the court defines the object of Congress in making the limitation to the grant; that it was not for the interests of the country, that while the road was being definitely located, any portion of the public lands should not be withheld from settlement or disposition by the government.

This, which the court terms a condition or limitation to this grant, was in force until the line or route of the road was definitely fixed. Therefore an important inquiry, and one which, so far as we have been able to discover, has not been answered by this court is, when, within the meaning of this act, was the line or route of this road definitely fixed? Was it when the map mentioned in the stipulation was approved by the Board of Directors of the Railroad Company, or was it when the map was filed with the Secretary of the Interior? or was it when the local land officers received notice of the filing of the map with the Secretary of the Interior, with orders to

withdraw the lands supposed to be covered by the grant from market? or was it when the company had taken possession of its right of way and commenced the construction of its road?

This question was before the Supreme court of Kansas in construing a grant similar if not identical with the one under consideration. In that case the court says:

"The other contention of counsel is, that in fact the company did have the title. The facts are that on July 25th, 1866, Miller made a homestead entry on the land. On the 3d day of July, 1866, an act of Congress was passed providing for the filing of a map of the general line of its road by the company, defendant, and that upon the filing of said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale, by order of the Secretary of the Interior. This act was but an extension of the right conferred by the original act of 1862, in which it was provided that upon the filing of the map of the general route, the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale. (12 U. S. Stat., p. 493, Sec. 7.) On July 11th the company filed its map. On July 14th the Commissioner of the general land office wrote to the local land offices to withdraw the lands from sale, homestead and pre-emption entry, which communication was received by them on July 26th, and on that day the proper entries were made upon their maps and plats to indicate such withdrawal. The line of the defendants' road along and adjacent to this land was not definitely filed until September 21st, 1866. *

Now it is claimed that by the filing of the map, the lands were withdrawn from market, and that no homestead or pre-emption right could thereafter attach. Hence, Miller's homestead entry was void, and the title passed by the grant to the company. We are inclined to think the view not correct. The lands are to be reserved from sale by order of the Secretary of the Interior, or, in the language of the prior act, he is to cause them to be withdrawn from sale, etc. This, it would seem, contemplates some act by the department, and until that act was completed the withdrawal was not made. No formal order of the Secretary is shown. The only thing is the letter from the Commissioner to the local land officers, and their action thereon. The land was then in fact withdrawn. Perhaps the order of the Secretary, if one was made, was to take effect upon the receipt by the local land officers of the notice and letter from the Commissioner. If so, it would seem to be within the scope of his powers. And in the absence of other showing, this action of the subordinates of the Secretary of the Interior must be taken as in fact the order of the Secretary. The language concerning withdrawal differs from that respecting the grant. The latter is, 'that there be and is hereby

granted,' etc. It is absolute, depending upon the action of no officer, and takes effect upon the passage of the act. (97 U. S., 491.) The other casts a duty upon the officer of the government. It does not provide that the lands shall be withdrawn upon the filing of the map and by virtue af that act alone, but that the Secretary shall cause them to be withdrawn when the map is filed. In other words, a duty is cast upon him, and on the performance of that duty the withdrawal is complete."

K. P. Ry. Co. v. Dunmeyer, 24 Kan., 725, 729.

That portion of the act which the court was considering in the case just cited is strongly analogous to that portion of the act which we are considering in the case at bar. While the court does not tell us what is meant by the words "definitely fixed," or just what acts on the part of the company constitute a definite location of its line within the meaning of the act, it does say that the filing of the map with the Secretary of the Interior is not such a definite location of the line as to divest the government of the title to the particular lands along its proposed line, but that the title to the lands remains in the government until the lands are actually withdrawn from market. The map was filed July 11th. The homestead was taken July 25th. The lands were withdrawn from market July 26th. The court holds the title of the homesteader as paramount to that of the company. According to all of the decisions, however, something more than the definitely fixing the line of the road by its board of directors is necessary to take the title to any particular lands from the government and vest it in the state. Otherwise, why require the filing of the map with the Secretary of the Interior. The road is as definitely fixed, so far as the company is concerned, when the line or route is agreed upon by its board of directors, as it ever can be by maps and resolutions. The simple act of filing the map with the Secretary of the Interior could have nothing to do with *definitely fixing* the line of road. The object which Congress had in permitting the company to file with the Secretary of the Interior a map of its proposed line and then making it his duty to withdraw the lands from market must have been one of two things. It was either to give the *public* notice of what lands were covered by the grant and that the government no longer had any title to

them, or it was to give the *Secretary of the Interior* notice where the company proposed to run the line of its road, so that he might know what lands the company claimed would be included in the grant when the road should be built, so that the government might reserve them for the company in case it complied with the conditions of the act.

That it was the latter of these objects, to our mind, is clear. If the former and the public are already notified, why make it the duty of the Secretary to withdraw the lands from market? If this was the notice Congress intended to give the public, would it not have been just as reasonable for it to have provided that in case of a homestead or pre-emption the secretary should withdraw the lands taken, from market? The fact that congress made it the duty of the Secretary to withdraw the lands shows that this was a part of the acts to be performed to perfect the title in the State. It will be noticed that there is nothing in section one, the section which makes the grant, in reference to filing the map. This provision is in section four, and is as follows:

"That as soon as the said company shall file with the Secretary maps of its lines designating the route thereof, it shall be the duty of the said Secretary to withdraw," etc.

It will not, we think, be contended that the title to any particular tracts passed from the government before the maps referred to were filed with the Secretary of the Interior. If the titles did pass before, they must have passed when the company's board of directors approved the map. And if the title to the definite tracts vested in the company when its directors approved the maps then no filing with the Secretary of the Interior was necessary. The company might, after having approved its maps of its route, with perfect safety as to its titles, have locked the maps in its safe, and never have permitted any person outside of its own board to have seen them. If the company had built ten miles of its road each year and completed it in the ten years, it might at the end of that time claim and receive every acre of land which belonged to the government designated by odd numbers for ten

sections in width on each side of its road, even though the company had given no notice of its intended route any faster than the road had been actually constructed, although the government may have in the meantime disposed of every acre of it to purchasers in good faith, and had received and retained the money for it. To us it seems that no argument should be required to show that Congress never intended that a construction should be placed upon this act which must result in so much injustice to the purchaser of these lands and cast at least the suspicion of fraud upon the Government.

The idea that the filing of the maps was to give notice to the public of the proposed location of the line or route of the road, is nearly if not quite as inconsistent with our notions of justice. Title could only be obtained to these lands at the Government land office, at Beatrice, Nebraska, more than two thousand miles from the office of the Secretary of the Interior, and the only portion of the public interested in the title to these lands was endeavoring to procure title thereto at the Beatrice Government land office. Can it now be said that the filing of this map by the company was notice to the people in Nebraska of the definite location of this road and an act of which they were bound to take notice at their peril. We do not believe that Congress intended that a construction should be placed upon this act which must result in such injustice.

The provision in the act permitting the company to file copies of its maps with the Secretary of the Interior, then making it the duty of the Secretary to withdraw from market the lands supposed to be covered by the grant, and the one giving to the company indemnity lands in lieu of those which the government might dispose of, are consistent with but one theory, and that is, that the title to this land remained in the government until the lands were withdrawn from market and the line of road was definitely fixed.

It is not, say the Supreme Court, in the case of Railroad Co. vs. Baldwin, *supra*,

"for the interests of the country that any portion of the public lands should be withheld from settlement or use because they might perhaps, when the route was surveyed, fall within the limits of a grant. Congress therefore adopted the policy of keeping the public lands open to occupation and pre-emption and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other lands in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired."

It is the policy of the government to encourage settlement on the public lands. It is not for the interests of the country that any portion of the public lands should be withheld from settlement. It is not the policy of the Government, neither is it consistent with fair dealing that it should sell lands to which it has no title. Such a course, in the language of this court in the case of Sessieur vs. Price, 12 How., 25,

"would have been certain to produce conflict of claims for the same land to a material extent and been contrary to a settled policy of the United States in disposing of the public lands, which is to avoid such conflict."

This act should be so construed as to, so far as possible, carry out the policy of the Government and prevent the perpetration of fraud. If the filing of the maps by the Railroad Company with the Secretary of the Interior, transferred *Eo instanti* the title to the lands in question to the State of Kansas, how was it possible for the Secretary of the Interior to keep the land office at Beatrice, Neb., without eminent danger of the Government selling lands to which it had no title. If the Secretary of the Interior exercised the utmost diligence a few days at least must necessarily elapse between the filing of the map and the withdrawal of the lands from market, and during this time in all probability some portions of the lands covered by the grant would be disposed of by the Government. A copy of the maps filed by the company and a list of the lands covered by the grant had to be prepared and forwarded to the local land office, and this would necessarily consume several days. During this time the Secretary of the Interior would be compelled either to close the Government land

offices where these lands were for sale or incur the hazard of having the Government dispose of lands to which it had no title, if this construction is to prevail. This is the only way we can see that the Secretary of the Interior could prevent what must appear to all fair minded persons, the perpetration of a swindle by the Government on the people. By giving the construction to the act which we contend for, the purposes of the act may be effected, the public interest subserved, and justice done to all parties; that is to say, hold all sales made by the Government valid until the lands were actually withdrawn, and in lieu of such lands as were disposed of by the Government which were covered by the grant, the Secretary of the Interior should convey to the company other lands, as provided in section one. This construction gives some force to the words "in such manner as may be best calculated to effect the purposes of this act and subserve the public interests." The construction contended for by the complainant annuls these words and gives them no force or meaning whatever.

The rule that in the construction of a statute, it should if possible, be so construed that all parts of it shall receive some force and meaning, is too well settled to require citation of authorities.

There is another point in this connection to which I wish to call the especial attention of the Court. The stipulation provides that:

"At a point one mile east of the lands in question in this suit, and about seventy-five miles east of Hastings, the road, as constructed, departed from the proposed line, as shown by the map; and the road, as built, was distant from the proposed line at the point opposite these lands in controversy from forty to sixty rods, and from said last-mentioned point west the line of the road as built deviates from the proposed line, as shown by said map, from one to three miles for the balance of the road."

If this line of road was definitely fixed by the filing of the maps, and the title to the lands along the line of this proposed road passed from the Government and vested in the State, by what authority did the company change the line or route of its road for the last seventy-five miles? And what effect did this change of line have

upon the title of the State to these lands? It will, we think, be conceded that the State took only the title to such lands as are within ten sections in width on each side of the road *as actually built*, and not ten sections in width on each side of the proposed line, as designated on the maps filed with the Secretary of the Interior. Suppose the company had never filed any maps of its line designating the route thereof with the said Secretary; or if, having filed maps, a different route had been chosen when the company came to construct the road, what lands would belong to the State of Kansas in trust for the company? Would it not be the odd-numbered sections for ten sections in width on each side of the road as constructed which belonged to the Government at the time the line or route of the road was definitely fixed? And when, under such circumstances, could it be said the line or route of the road was definitely fixed? Would it not require some act on the part of the company so open and notorious that the public must be supposed to know where it intended to build the road? It is admitted that opposite to the lands in question in this suit the road as built deviates or is distant from the proposed line from 40 to 60 rods, and that for the balance of the road it leaves the proposed line from one to three miles. The proposed line as designated on the maps filed was for the last seventy-five miles entirely abandoned. Can it be said that as to these seventy-five miles the line or route of the road was definitely fixed by the filing of a map designating an entirely different route? We think that where the company have made any substantial deviation in the construction of its road from the proposed line, the company would only take such lands as belonged to the Government at the time such deviation was made and the opinion of the supreme court of the State of Kansas.

A., T. & S. F. R. R. Co. v. Mecklin, 23 Kan., 167.

Again, the stipulation provides that:

"On the first day of April, 1873, and not before, the said railroad company filed in the office of the Secretary of State of Nebraska a paper which contained the exhibits heretofore referred to and hereto attached, marked A, B, C, D, and F, but did not before said last-mentioned date file its Articles of Incorporation in the office

of the Secretary of State of the State of Nebraska, or otherwise attempt to comply with the laws of that State in respect of foreign railroad corporations extending their roads into that State."

The legislature of Nebraska in 1869 passed the following act:

"That any railroad company heretofore organized under the laws of the States of Kansas, Missouri, or Iowa is hereby authorized to extend and build its road into the State of Nebraska. And such railroad companies shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities of railroad companies organized and incorporated under the laws of this State. *Provided*, Such non-resident company shall FIRST file a true copy of its Articles of Incorporation with the Secretary of this State, and shall comply with the laws of Nebraska as to filing and recording Articles of Incorporation, and in all things required by law relating to railroads and otherwise in this State; and such non-resident railroad shall keep an office in this State in some county in which its road is, or is proposed to be, and shall be liable to civil process, to be sued and to sue as provided by law."

General Statutes of Nebraska, 203.

The law also provides that railroads organized under the laws of this State shall file with the Secretary of State a certificate showing, among other things, "the names of the places the termini of said road, and the county or counties through which the road shall pass."

General Statutes of Nebraska, 183.

The act of Congress making the grant was passed in July, 1866. The land in controversy in this suit was sold by the government to this defendant in April, 1870. The grant was made to the State of Kansas in trust for a railroad corporation created under and by virtue of the laws of Kansas, and there was no paper filed or act done by this corporation whereby it attempted to comply with the laws of the State of Nebraska in reference to foreign corporations extending their road into this State until April, 1873. There are no express words in the act making the grant extending the grant beyond the limits of the State of Kansas and into the State (then Territory) of Nebraska. The only words that would imply that the road would extend into Nebraska are, "so as to effect a junction with the Union Pacific Rail-

road or any branch thereof not further west than the one hundredth meridian west longitude." It will be insisted on the part of the complainant that the company, when it filed its maps of its route with the Secretary of the Interior, had done all it could to complete its title to these lands and give the public notice. In reply, we say, first: That the section of the law which provides for the filing of the maps makes it the duty of the Secretary of the Interior, upon the filing of such maps, to withdraw the lands from market. When a duty is enjoined upon an officer, a reasonable time should be allowed him for the performance of that duty. Secondly. As we have seen, the statutes of Nebraska make it incumbent on the company, in case it proposed to extend its line into the State of Nebraska to file its articles of incorporation, and also a certificate showing, among other things, the names of the places of the termini of its road, and the county or counties through which the road shall pass, with the Secretary of State, and also to keep an office in come county in the State through which it proposed to build its road. Nearly four years had elapsed after the passage of the act making the grant before this defendant purchased this land, and yet the company had done nothing which the laws of Nebraska required it should do, in case it proposed to extend its road into that State. Had these papers been on file as the law required, in case the company proposed to extend its road into that State, it might with reason be said that the company had done what it could to complete its title and give the public notice. There is nothing in the act making the grant, extending the grant into Nebraska. A branch of the Union Pacific Railroad could have been reached by this company without extending its line out of the State of Kansas. A Kansas corporation had no right to extend its road into the State of Nebraska without first having complied with the laws of Nebraska. In the case of Augusta vs. Earle, 13 Pet., 512, the court says:

"That the artificial person or legal entity known to the common law as a corporation, can have no legal existence out of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law, and when the law ceases to operate the corporation can have no existence. It must dwell in the place of its creation."

And in the case of the Ohio & Mississippi Railroad Company vs. Wheeler, 1 Black, 297, the court say:

"It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of the laws of the States as one corporate body, exercising the same powers and duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, or add to or diminish the powers to be there exercised. It may indeed be composed of and represent under the corporate name, the same natural persons, but the legal entity or person which exists by force of law can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company are, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio."

The act of Congress making the grant does not purport to confer on the St. Joseph and Denver Railroad Company a right to extend its road into Nebraska. The act speaks of the railroad company as "a corporation created under and by virtue of the laws of Kansas." And as we have seen, the laws of Kansas could only confer on this company the power to build its road to the Kansas line. Certainly its filing maps of its line with the Secretary of the Interior could give it no rights in Nebraska. If this corporation has any rights in Nebraska, it is by virtue of the laws of that State. It is admitted that this corporation has not complied (and that prior to April, 1873, it did not attempt to comply) with the conditions upon which the rights claimed are conferred. When this defendant purchased these lands there was no corporation in existence which had the right to build this road in Nebraska. Must he at his peril have anticipated that such a corporation would be created.

It is at least questionable whether this act can be so construed as to extend the grant into the State of Nebraska. This is a grant to a corporation created by the laws of Kansas to aid in the construction of a railroad, the location of the road determines the location of the grant and the terms of the grant may be complied with, without the

road being extended into the State of Nebraska or out of the State of Kansas, and as we have seen, this Kansas corporation could not extend its road out of that State. As an authority directly in point as to the grant being confined to the State of Kansas, we quote from the opinion of Attorney General Caleb Cushing, in the case of "the Des Moines Improvement Co." where in construing a grant made by Congress to the State of Iowa, for the purpose of aiding in the improvement of the navigation of the river Des Moines, he says:

"Now, the language of the act is explicit, granting to Iowa the alternate sections in a strip five miles in width on each side of said river Des Moines, and the improvement is, in the equally explicit terms of the act, from its mouth to the Racoon Fork; but while carrying the grant above the Racoon Fork to the source of the Des Moines, where the improvement does not reach, he (Mr. Walker) lops it off below along the line of the improvement, by excluding lands on the river in the State of Missouri. The explanation of which is, that for the last twenty-five miles of its course, the river Des Moines is the dividing line between the States of Missouri and Iowa. Missouri enjoys directly all the benefits of the improvement of the navigation of the river; but no land in Missouri is to be comprehended in the grant, nothwithstanding its terms are of lands *on each side* of the river; for the obvious and sufficient reason that the act contains no provisions authorizing, but on the contrary forbids Iowa to take hold and manage lands in the State of Missouri. * * *

Opinions of Attorney Generals, 7 Vol., pp. 704–706.

This is a grant of land to the State of Kansas in trust for a corporation organized under the laws of Kansas in aid of the construction of a railroad. The location of the road determines the location of the grant. It is ten sections in width on each side of the road. It will hardly be contended that congress intended to extend this grant beyond the limits where the corporation could lawfully build its road. This Kansas corporation could not lawfully extend its road into the State of Nebraska; certainly not without first having complied with the laws of the State of Nebraska; and when these laws have been complied with, the corporation in Nebraska is, as we have seen by the case of Ohio & Mississippi R. R. Co. vs. Wheeler, *supra*, separate and independent from the one in Kansas, and even though it is composed and controlled by the same president and board of directors, and derives all of its rights and powers from the laws of Nebraska.

The terms of the grant contained in the act under consideration should be strictly construed against the grantee. In the case of the Dubuque & Pacific R. R. Co. v. Litchfield, 23 How., 66, the court says:

"All grants of this description are strictly construed against the grantee. Nothing passes but what was conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed can not be implied."

And the same language is used in the case of Leavenworth, etc., R. R. Co. v. U. S., 92 U. S., 740.

If this Kansas corporation had any right to extend its road into Nebraska prior to April 1, 1873, it obtained that right by virtue of this act of Congress; and if it had no such right, then the lands in question were not included in the grant. Now, where is the section, clause, or word in this act of Congress conferring any additional

powers on this corporation as such. The grant is to enable it to carry out the object for which it was already created.

The railroad company has never complied with the conditions of the grant in building its road to the Union Pacific railroad, or any branch thereof. The Burlington road is not a branch of the Union Pacific. It was not entitled to the privileges nor subject to the obligations of the roads mentioned in the act of 1862, and especially in Sec. 15, act of 1864, nor was there any power to enforce such regulations. The grant to the Burlington road is an independent grant, different in its extent and the manner in which the lands were to be selected.

All the equities are in favor of the defendant. That he purchased the land in good faith nearly ten years before the commencement of this suit, at the proper government land office and paid his money for it, is admitted. That a patent was issued to him in the regular course of business by the government is alleged in complainant's bill. That he took possession of this land soon after the purchase, and that he has since that time paid all taxes and assessments which have been levied on this land without objection or protest on the part of the complainant or his grantee cannot be denied.

We think the judgment of the court below should be reversed.

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